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373 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Jan. 8, 1947.)

Comes now the respondent, Anaconda Copper Mining Company, a corporation, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and moves upon the amended complaint herein and the affidavit of E. O. Sowerwine, vice president of said respondent, verified January 6, 1947, attached hereto, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to this respondent for the following reasons:

1. That it appears from the face of the amended complaint herein that the charges relate to prices, terms of sale, offers to sell and sale of lead pigments in commerce. That the evidence in this proceeding does not show that Anaconda Copper Mining Company was ever engaged in the manufacture or sale of lead pigments. That the annexed affidavit of E. O. Sowerwine shows that respondent
374 has never engaged in the business of the manufacture or sale of lead pigments; that International Smelting and Refining Company, a wholly owned subsidiary of Anaconda Copper Mining Company, at the time of the issuance of the amended complaint herein was engaged in the manufacture and sale of the lead pigments, dry white lead and white lead-in-oil; that International Smelting and Refining Company is now completely and permanently out of the business of the manufacture and sale of lead pigments; that there is no reason to believe that it will ever re-enter said business; that Anaconda Copper Mining Company does not ever intend to engage in the business of the manufacture or sale of lead pigments; and that there is no reason to believe the respondent will ever enter into or engage in said business.

2. In view of these facts, there would, therefore, seem
375 to be no significance to the present proceeding, and since it affirmatively appears that there is now no sufficient public interest to sustain the amended com-

plaint herein as to this respondent, it is respectfully submitted that the amended complaint be dismissed as to this respondent.

January 6, 1947.

Chadbourne, Wallace, Parke & Whiteside,
By .....

Office and Post Office Address:
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.,
Attorneys for Respondent, Anaconda Copper Mining Company.

376 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

State of New York, }
County of New York. } ss:

Comes now E. O. Sowerwine, vice president of Anaconda Copper Mining Company, a corporation, and, being duly sworn, deposes and says as follows:

That Anaconda Copper Mining Company has never engaged in the manufacture or sale of lead pigments; that a wholly owned subsidiary, International Smelting and Refining Company, a corporation, was at one time engaged in the manufacture and sale of dry white lead and white lead-in-oil, but is now completely and permanently out of the business of the manufacture and sale of lead pigments, and there is no reason to believe that
377 it will ever re-enter said business; that Anaconda Copper Mining Company does not intend to engage in the business of the manufacture or sale of lead pigments; and that there is no reason to believe that either it or any of its subsidiaries will enter into or engage in said business.

E. O. Sowerwine.

Sworn to before me this 6th day of January, 1947.

Frank G. Ryan,
Notary Public, State of New York
Residing in Westchester County
N. Y. Co. Clk's No. 407, Reg. No. 520-R-7
Commission expires March 30, 1947.

378 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Jan. 8, 1947.)

Comes now the respondent, International Smelting and Refining Company, a corporation, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and moves upon the amended complaint herein and the affidavit of Frederick Laist, vice president of said corporation, verified January 6, 1947, attached hereto, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to this respondent for the following reasons:

1. That it appears from the face of the amended complaint that the charges therein contained relate to prices, terms of sale, offers to sell, and sale of lead pigments in commerce. That Commission's Exhibits 836 A, B, K and L in this proceeding show that respondent had permanently gone out of the business of the manufacture and sale of lead pigments. That the annexed affidavit of

379 Frederick Laist, vice president of International Smelting and Refining Company, shows that respondent has permanently discontinued the manufacture and sale of lead pigments; that respondent has sold its only plant where lead pigments were manufactured and the property it is erected on; that respondent has sold all the machinery and other equipment necessary to the production of lead pigments which it owned; that respondent has shipped all lead pigments, which were on hand when production was stopped, to customers; that, with the exception of a few individuals, all qualified technical and sales personnel have either remained with the purchaser of said plant or secured employment elsewhere than with respondent; that respondent is, in fact, permanently out of the business of the manufacture and sale of lead pigments; that respondent has no intention of ever re-entering said business; and that there is no reason to believe that respondent will ever re-enter said business.

2. In view of these facts and since any order aris-

380 ing out of this proceeding will relate to future opera-

tions of this respondent in the manufacture and sale of lead pigments and since said respondent has permanently discontinued such business and since there would, therefore, seem to be no purpose in continuing the respondent as a defendant and placing upon it the burden and expense of further defending this action and since it further affirmatively appears that there is now no sufficient public interest to sustain the amended complaint herein as to this respondent, it is rspectfully moved that the amended complaint be dismissed as to this respondent.

January 6, 1947.

Chadbourne, Wallace, Parke & Whiteside,
By Robert C. Gormley,
Office and Post Office Address:
No. 25 Broadway,
Borough of Manhattan,
New York 4, N. Y.,
Attorneys for Respondent, International Smelting and Refining Company.

381 BEFORE FEDERAL TRADE COMMISSION.

(Caption—5253)

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

State of New York, }
County of New York. } ss:

Comes now Frederick Laist, vice president of International Smelting and Refining Company, a corporation, and, being duly sworn, deposes and says as follows:

That International Smelting and Refining Company was through its Pigment Division at East Chicago, Indiana, engaged prior to August 1, 1946, in the manufacture and sale of dry white lead and white lead-in-oil, these being the only lead pigments manufactured or sold by said Company; that in May, 1946, it was decided to suspend operations and permanently discontinue the manufacture

and sale of said lead pigments; that the reasons for
382 this action were that these operations had become uneconomical due to an ever decreasing tonnage of lead bullion available to respondent and increased labor costs; that International Smelting and Refining Company has now in fact permanently discontinued the business of the manufacture and sale of said lead pigments; that this was accomplished by stopping the production and manufacture of said lead pigments in July 1946 and declining to accept orders from the trade after August 1, 1946, by shipping all such materials on hand to customers by the end of that month, and by selling the plant and property where these materials were manufactured and all physical assets and equipment used in the manufacture of said lead pigments; that, with the exception of a few individuals, all qualified technical and sales personnel connected with the manufacture and sale of said lead pigments have either been retained by the purchaser of said plant or secured employment elsewhere than with the International Smelting and Refining Company; that, as evidenced by the attached exhibits A, B and C, it is common knowledge
383 among the trade that International Smelting and Refining Company is permanently out of the business of the manufacture and sale of lead pigments; that International Smelting and Refining Company has no intention to ever re-enter said business; that in view of all the facts and circumstances, there is no reason to believe that International Smelting and Refining Company will ever again engage in the manufacture and sale of lead pigments.

Frederick Laist.

Sworn to before me this 6th day of January, 1947.

Veronica T. Burke,
Notary Public, State of New York
Residing in Bronx County
Bronx Co. Clk's No. 196, Reg. No. 144-B-7
N. Y. Co. Clk's No. 259, Reg. No. 277-B-6
Commission expires March 30, 1947.

384 "Exhibit A."

The following is a copy of an announcement distributed to the Trade:

Letterhead of

International Smelting and Refining Company,
East Chicago, Indiana.

Pigment Division.

June 1st, 1946.

To the Trade:

Our operations at East Chicago have been seriously affected by the trouble with which every concern has to contend. We refer principally to shortages of labor and supplies, higher prices for both of these, quotas which reduce volume and automatically increase production costs and restrictions on prices for finished products.

Because of these conditions operations at East Chicago have been unsatisfactory for some time. Since it appears unlikely that there will be sufficient relief reasonably soon it has been decided that operations will be discontinued permanently.

We expect to fulfill any second quarter obligations to our regular customers that we may have. All available tonnage will be distributed equitably and the regular grades will be furnished to the extent that this is possible.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company.

385 "Exhibit B."

The following is an extract from the Paint, Oil & Chemical Review of June 13, 1946:

International Refining Bows to Post War Difficulties.

Operations of the pigments division, International Smelting & Refining Co., a subsidiary of Anaconda Copper Company, will be permanently discontinued, according to company announcement. The plant in East Chicago, Ind., manufactures white lead, zinc oxide and other pigments. The company will fulfill second quarter obligations to regular customers. All available tonnage will be distributed equitably and regular grades furnished to the extent possible. The plant operations have been seriously affected by shortages of raw materials and labor, higher prices for both; quotas which reduce the output volume and automatically increase production costs; and price restrictions on finished products. Since it appears that sufficient relief will not be forthcoming soon it has been decided that operations be permanently discontinued, an official of the firm stated.

386A "Exhibit C."

The following is a copy of an announcement distributed to the trade.

Letterhead of

International Smelting and Refining Company,
East Chicago, Indiana.

Pigment Division.

June 20, 1946.

To the Trade:

It has been decided to permanently suspend operations at the East Chicago Plant of the International Smelting and Refining Company and discontinue the business.

We appreciate the consideration the trade has shown us during the many years we have been in business. We regret this action is necessary but feel no other course is open to us.

International Smelting and Refining Company.

392 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION OF RESPONDENT, NATIONAL LEAD COMPANY, TO DISMISS AMENDED COMPLAINT AND STATEMENT AND BRIEF IN SUPPORT THEREOF.

(Received Feb. 25, 1947.)

Alexander & Green,
Attorneys for Respondent,
National Lead Company,
Office & Post Office Address,
No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
of Counsel.

February 25, 1947.

396 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AMENDED COMPLAINT.

Comes now the respondent, National Lead Company, and by its counsel moves upon the amended complaint herein and upon all proceedings heretofore had herein that the Federal Trade Commission enter an order dismissing the amended complaint herein upon the ground that there has been a failure of proof with respect to both Counts of the amended complaint, as more fully set forth in the supporting statement and brief forming part of this motion and hereto annexed.

Respondent respectfully requests oral argument before the Commission.

Respectfully submitted,
Alexander & Green,
James D. Ewing,
of Counsel,
Attorneys for Respondent,
National Lead Company,
Office & Post Office Address,
No. 120 Broadway,
New York 5, N. Y.

February 25, 1947.

397 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT.

Statement.

Respondent National Lead Company makes this motion to dismiss the amended complaint at the close of the Commission's case upon the ground that, as a matter of law, there has been a failure of proof with respect to both counts of the amended complaint.[1]

The respondents are as follows: (1) National Lead Company; (2) Eagle-Picher Company and its subsidiary, Eagle-Picher Sales Company; (3) The Glidden Company; (4) The Sherwin-Williams Company; (5) Anaconda Copper Mining Company, and (6) International Smelting and Refining Company.

Count I of the amended complaint, in effect, charges respondents with a monopoly to fix prices of lead pigments in interstate commerce in violation of Section 5 of the Federal Trade Commission Act and Count II charges respondents upon essentially similar allegations with a violation of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. We submit that the essential charge in the amended complaint is that of monopoly to fix prices and indeed, at the time the Commission rested its case, Trial Counsel for the Commission stated that it was his feeling "that this case is essentially a price-
398 fixing and monopoly case and that that is the essential charge" (Tr. 2068). It is to this charge, therefore, that this brief primarily will be directed, although, of course, we maintain and we shall show that there has been no proof under Count II showing any violation of the Robinson-Patman Act.

The Commission is wholly familiar with the recent line of cases dealing with manufacturers who were members of a trade association and who were charged with violating

1. Respondents Anaconda Copper Mining Company and International Smelting & Refining Company have heretofore on January 8, 1947 moved to dismiss the amended complaint upon separate grounds. The other respondents are making separate motions to dismiss.

both the Federal Trade Commission Act and the Clayton Act. Those cases are: *Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321; *U. S. Malsters Ass'n* v. *Federal Trade Commission,* 152 F. (2d) 161; *Milk and Ice Cream Can Institute* v. *Federal Trade Commission,* 152 F. (2d) 478; *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 F. (2d) 899; and the recent *Cement* decision, *Aetna Portland Cement Co.* v. *Federal Trade Commission,* 157 F. (2d) 533; all decided by the Circuit Court of Appeals for the Seventh Circuit.

There is a marked difference between the situations which obtained in the cases just cited and that disclosed by the Commission's case in this proceeding.

The Commission's own proof in the instant case shows:

(1) There was no exchange of price information between respondents either through Lead Industries Association or otherwise at any time, even during N. R. A. days.

(2) There was no agreement to fix prices nor any "planned common course of action" which resulted in the adoption of uniform prices at any time, even during N. R. A. days.

(3) There was no agreement or concerted action to curtail production at any time, even during N. R. A. days.

(4) The Lead Industries Association was not used as a medium for the exchange of freight factors, freight rates, individual production data, items of past, present or future individual transactions, prices or any other individual sales, freight or production factors. Hence this case does not involve practices similar to those condemned by the Commission and the Courts in the cases cited (excepting the *Cement* case, of course).

389 (5) The Lead Industries Association was composed not only of these respondents but of lead mining companies, lead smelters and refiners, and other companies with interests diverse from those of these respondents.

(6) In this case the present record indicates that any similarity or identity of card or list prices of respondents was the result of the price leadership of the National Lead Company. That price leadership under the circumstances here disclosed does not constitute any violation of law (*U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417; *U. S.* v. *International Harvester Co.,* 274 U. S. 693; *U. S.* v. *Stand-*

ard Oil of N. J., 47 F. [2d] 288; and *cf., U. S.* v. *Socony-Vacuum Oil Co.*, 210 U. S. 150, 198-199).[1]

Although probably it will be disputed by Trial Counsel for the Commission, we respectfully submit that the sole question for the Commission, insofar as Count I of the amended complaint is concerned, is: Does the existence of substantial similarity in card or list prices within an industry which has a demonstrated price leader, without more, constitute "reliable, probative, and substantial evidence" of a conspiracy or combination to monopolize and fix prices in that industry?

The Trial Examiner has stated that this proceeding is being conducted under the Administrative Procedure Act (Tr. 1903). Section 7 (c) of that Act provides that the proponent of a rule or order shall have the burden of proof and that no rule or order shall be issued except upon consideration of the whole record and except as supported by and in accordance with the "reliable, probative, and substantial evidence." Our position is not only that Trial Counsel for the Commission in the proof submitted by him has wholly failed to sustain the burden of proof but also that, viewed as a whole, the record contains no reliable, probative and substantial evidence, proving any of the charges of the amended complaint.

400 We therefore earnestly urge that the Commission, in the interest of respondents and of the public at large, dismiss both counts of the amended complaint. In the alternative, we urge that the Commission dismiss Count I and all of Count II, except insofar as the Commission may feel that there is some proof under Count II, establishing a *prima facie* case (which we deny) with respect to quantity, trade (i. e., "functional") or regional discounts resulting from the pricing methods used by some or all of the respondents.

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1. References in this brief involving an assumption that National Lead Company is the price leader are for the purposes of this motion only and are not to be construed as admissions. When in this brief we refer to the fact that others "follow" National's card or list prices, the word "follow" or its like is used in the sense of voluntarily and without compulsion, pressure or influence on the part of National. References in this brief to card or list prices are to the prices paid by purchasers from the manufacturer or its agents or dealers or distributors.

The Pleadings.

The original complaint was served and filed in November, 1944, and dealt solely with a product known as white lead manufactured by the respondents, among others.

The amended complaint was not served and filed in November, 1944, and dealt solely with a product known as white lead manufactured by the respondents, among others.

The amended complaint was not served and filed until April, 1946, almost seventeen months after the filing of the original complaint. The amended complaint broadened the issues so as to cover "lead pigments", defined in the amended complaint as including white lead, blue lead, red lead, litharge, orange mineral and grinders' lead paste.

Count I of the amended complaint in effect sets forth two charges: (1) that National Lead Company has monopolized or attempted to monopolize the interstate sale of lead pigments and (2) that all of the respondents have combined, conspired and cooperated to hinder, lessen and eliminate price competition in the sale of lead pigments, and in so doing have employed certain unfair, oppressive and discriminatory acts, methods and practices.

The allegations with respect to the first aspect of the monopoly charge are set forth in Paragraph Seven A of Count I, wherein it is alleged that beginning with 1891, when it was formed, National Lead Company began upon a program of aggrandizement which resulted in the acquisition of properties of various concerns manufacturing lead pigments, linseed oil and kindred products; that National Lead Company also secured control over a substantial part of the capital stock of respondent, Eagle-Picher Lead Company; and that National, through its relationship with American Smelting & Refining Company "and others", exerts a "monopolistic influence" upon the determina-
401 tion and quotation of ~~the~~ market prices on pig lead which is used in the manufacture of lead pigments (see subdivision [8] of Paragraph Seven A of Count I, which frankly is as confusing to us as was the proof offered in support thereof before the Trial Examiner).

The essential charge in Count I of the amended complaint is set forth in subdivision B of Paragraph Seven. This is the part of the amended complaint which charges the respondents with a combination and conspiracy to fix prices. Subdivisions (1) through (7) of this portion of the amended

complaint allege that respondents conspired and agreed among themselves with respect to the following acts and practices:

(1) That respondents agreed to adopt and did adopt and maintain a system of delivered price quotations which prevented reflection of any differences in the costs of delivery as between purchasers of lead pigments;

(2) That respondents agreed to adopt and did adopt and maintain a plan whereby the United States was divided into so-called zones, in each of which prices to all purchasers of a class were "matched", except that by prearrangement and understanding the offers made in some instances by respondents, Glidden, Sherwin-Williams and International, were below the "matched offers" of respondents, National and Eagle-Picher;

(3) That the respondents agreed to seek and secure and did secure the cooperation of Lead Industries Association and its officers, employees and agents in fixing and adopting non-competitive terms and conditions of sale;

(4) That respondents exchanged directly and through the office of Lead Industries Association price factors and information concerning price factors which were used by the respondents in calculating and determining their offers to sell lead pigments;

(5) That respondents agreed to adopt and did adopt and maintain so-called consignment or agency agreements under the leadership of National Lead Company for the purpose of preventing dealers from selling
402 white lead (as distinguished from all lead pigments) and from selling lead products at prices lower than the offers made by respondents;

(6) That respondents agreed to fix and did fix prices, terms and conditions of sale of lead pigments;

(7) That respondent National Lead Company entered into certain contracts with E. I. du Pont de Nemours Company, Inc. for the purpose of promoting maintenance of levels of price fixed by National and other producers and sellers of white lead (again as distinguished from all lead pigments).

Paragraphs Eight and Nine of Count I deal with the alleged unfair acts and pricing methods indulged in by the respondents in furtherance of the combination and con-

spiracy alleged in Paragraph Seven. A detailed analysis of these paragraphs is hardly necessary and they may be summarized as alleging that respondents employed certain zones, which differed as to the various lead pigments, in which there was a base zone with an established differential above the base price for the other zones (Paragraph Eight); that respondents required their dealers to resell products at fixed prices and terms; that there were fixed differentials for various sized kegs of lead pigment running from 12½ pounds to 100 pounds; that each respondent from time to time entered into so-called quarterly contracts with large industrial consumers; and that respondents issued cards or price lists setting forth the terms of sale to various classes of customers and for various types of pigments, so that any given prospective purchaser of lead pigment in any given quantity, at any given destination, would pay the same price to any respondent except that Anaconda, Sherwin-Williams and Glidden at times offered to sell at a small differential below the prices of National and Eagle-Picher (Paragraph Nine).

Paragraphs Ten, Eleven and Twelve of the amended complaint contain the usual conclusions that, as a result of the unfair and oppressive discrimination of prices by respondents, there was a substantial lessening of competition among respondents, all to the prejudice of the public and of purchasers of lead pigments.

Count II of the amended complaint deals with the alleged violation of Section 2 (a) of the Clayton Act as amended
403 by the Robinson-Patman Act. There are two main features under this count: first, it is claimed that where the same price is charged to all purchasers within a zone, regardless of the location of the purchaser, there is discrimination in price within the meaning of the Robinson-Patman Act by reason of the fact that those purchasers located near the producing mills are deprived of their natural advantage freightwise (the so-called "mill net" theory) (Paragraphs Eight and Nine); second, it is stated that when sales are made to customers located at or near the borders of adjoining or contiguous zones the prices charged to purchasers in the zone having a lower differential are discriminatory insofar as purchasers in the higher zone are concerned (Paragraph Ten). Paragraph Eleven does also contain the omnibus allegation that the quantity, trade (i. e., "functional") and regional discounts quoted

by respondents are discriminatory, but, as we have said, we believe that the main questions concerned in Count II deal with the so-called mill net theory as it applies to a uniform delivered price throughout any one particular zone and the use of the zone system insofar as purchasers located at or near the borders of adjoining or contiguous zones are concerned.

The respondents' answers are in effect a general denial of the material allegations of the amended complaint. There are also certain affirmative allegations in some of the answers and certain affirmative defenses which are not material on this motion.

Proceedings.

As we have stated, the original complaint was served and filed in November, 1944. Thereafter answers were filed by the respective respondents. Hearings were had in January, February and May, 1945, in New York, Cincinnati, Cleveland and Washington. These hearings were devoted primarily to identification of documents. No further hearings were held until June, 1946, but meanwhile, in April, 1946, the amended complaint was served, broadening the scope of the proceeding to include all lead pigments as defined in the amended complaint, whereas the original complaint was concerned only with white lead.

Hearings were had under the amended complaint in Washington on June 17, 18, 19 and 20, 1946; in New 404 York on June 24, 25, 26 and 27; in Cleveland on July 24 and 25; in St. Louis on July 29 and 30; in Washington on October 2, 3 and 4; in Chicago on November 13 and 14; in Kansas City on November 18; in St. Louis on November 19; in Nashville, Tennessee, on November 21; in Birmingham, Alabama, on November 22; and finally on January 7 and 8, 1947, in Washington, at which time Trial Counsel for the Commission rested. It was at these hearings in 1946 that most of the documentary evidence theretofore marked for identification was introduced in evidence and oral testimony given. The record now comprises more than 2,000 pages of transcript and approximately 3,500 pages of documentary exhibits.

We shall refer from time to time to evidence, documentary and parol, received over timely objection on the part of the respondents. Such references are not to be

construed as a waiver by respondents of any timely objections heretofore made and respondents reserve all their rights with respect thereto. Moreover, any statement concerning the testimony and exhibits shall not be construed as an admission of the accuracy thereof, nor shall any statement in this brief be construed as an admission of fact upon the part of any respondent. We are here, for the purposes of this motion only, taking all of the evidence introduced by Trial Counsel for the Commission at its face value.

The Facts.

A. The Products Involved:

The amended complaint served in April, 1946, defines the term "lead pigments" to include white lead, blue lead, red lead, litharge, orange mineral and grinders' lead paste, in both dry form or in oil in the form of a paste after being mixed with linseed or other oils. While Paragraph Five of the amended complaint deals with the use of lead pigments in the manufacture of paint, the proof has shown that the lead pigments (as defined in the amended complaint) involved in this proceeding not only are used in the manufacture of certain types of paint but, as oxides (red lead and litharge), so-called, form one of the principal material items in the manufacture of storage batteries.

White lead is sold as dry white lead and as white lead in oil. Dry white lead is used in the manufacture of paint
405 by paint grinders and white lead in oil is mixed with other ingredients to form outside house paints.

Red lead, an oxide, is used in red lead paint and in the manufacture of storage batteries.

Litharge, so far as this proceeding is concerned, is used primarily in the manufacture of storage batteries.

The other lead pigments referred to in the amended complaint, namely, blue lead, orange mineral, and grinders' lead paste, are insignificant items and therefore will not be discussed since almost the entire body of the evidence, both parol and documentary, deals with white lead, red lead and litharge.

B. The Respondents:

National Lead Company is the largest producer of white lead and lead oxides. During the period involved in this proceeding (frequently denominated by Trial Counsel for

the Commission as the "normal period" from 1936 to 1941) National Lead produced approximately 60% of the white lead in oil, from 30% to 35% of the dry white lead, and 50% of the oxides, red lead and litharge (Tr. 1647, 1665, 1666; Com. Ex. 664). The combined total percentage for white lead in oil and dry white lead was 58.8% in 1938 and 53% in 1941 (Com. Ex. 669). National's white lead plants are located at Perth Amboy, New Jersey, Philadelphia, Chicago, St. Louis, and Oakland, California (Tr. 1071-1072). Its oxides, red lead and litharge, are produced at nine plants located in Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles, and San Francisco (Tr. 1625).

While formerly National secured the bulk of its corroding pig lead from the American Smelting & Refining Co., it has purchased the raw material from a number of companies, including the St. Joseph Lead Co., U. S. Smelting & Refining Co., American Smelting & Refining Co., Anaconda Sales Company, and three or four others (Tr. 1068). The largest single source of supply at the present time is the St. Joseph Lead Co. (Tr. 1069).

Eagle Picher Company for the period from 1930 to the present time produced from 15 to 20% of the white lead
406 in oil and approximately 10% of the dry white lead (Tr. 1560, 1561). Its combined total for dry white lead and white lead in oil was 14.3% in 1938 and 12.5% in 1941 (Com. Ex. 669). This respondent produced white lead at its plant in Cincinnati and its oxides, read lead and litharge, in Joplin, Missouri, and Newark, New Jersey (Tr. 1552, 1564). The bulk of its corroding lead is purchased from the U. S. Smelting & Refining Co., East Chicago, Indiana, although Eagle-Picher produces some lead itself in the Tri-State area of Missouri, Kansas and Oklahoma (Tr. 1561-1562).

The Glidden Company has two divisions, one, the Metals Refining Co., acquired by Glidden in 1928 or 1929, which produces oxides, red lead and litharge, at Hammond, Indiana, and the other, Euston Lead Co., acquired about 1923, which produces white lead at its plant in Scranton, Pennsylvania (Tr. 1230, 1231, 1233). In 1943 Glidden produced between 6 and 7% of the red lead in oil and a smaller percentage of dry red lead and litharge. It also produced 8% or 9% of white lead in oil and approximately 16% to 18% of dry white lead (Tr. 1307, 1308).

The Sherwin-Williams Company produces white lead and oxides (red lead and litharge) only at its plant in Chicago (Tr. 1313). It obtains its pig lead requirements from practically all suppliers (Tr. 1313). In 1944, Sherwin-Williams produced about 5% of the white lead in oil used in this country and approximately the same percentage for many years prior thereto. For many years its dry white lead and litharge sales represented less than 1% respectively of the total sales in this country, while its dry red lead and red lead in oil sales were approximately nil (Tr. 1331-1332). Sherwin-Williams obviously is not an important factor in the sale of dry lead pigments. It does not compete in the sale of oxides to battery manufacturers (Tr. 1648).

Anaconda Copper Mining Company has never engaged in the business of the manufacture or sale of lead pigments. Neither International Smelting & Refining Co., the subsidiary of Anaconda Copper Mining Co., nor its predecessor, the Anaconda Lead Products Co., ever produced oxides. Anaconda Lead Products Co. began the production of dry white lead at its plant in East Chicago, Indiana, in
407 1919 and the production of white lead in oil at the same plant in 1931. In 1936 the International Smelting & Refining Co. acquired the property and assets of Anaconda Lead Products Co. The principal source of supply of pig lead was lead bullion smelted by the International Smelting & Refining Co. in Utah and refined in East Chicago, Indiana. A small amount was also secured through the treatment of secondary lead purchased on the open market (Com. Ex. 836-A-N). For the period from 1937 to 1943 International's percentage of the white lead in oil business varied from approximately 3% to 4% and its percentage of dry white lead for the same period varied between approximately 10% and 19% (Com. Exs. 741, 836-J). International's combined percentage for dry white lead and white lead in oil was 6.6% in 1938 and 8.8% in 1941 (Com. Ex. 669).[1]

1. This same exhibit shows the following combined percentages for other companies in the period 1937-1941 (some of whom are not respondents): W. P. Fuller, approximated 3% during this period; MacGregor, an increase from 1.6% in 1938 to 3.2% in 1941; "other companies" (stated to include Glidden and Sherwin-Williams) 17.1% in 1938, 18.3% in 1939, 21.4% in 1940, and 19.3% in 1941.

C. The Pricing Methods of the Respondents:

Since the essential charge in Count I is a price fixing monopoly, it will be necessary to consider the pricing methods used by the various respondents. In this connection it will be well to bear in mind that there were not only differences which existed among the respondents themselves but also that the three main products involved, namely, white lead in oil, dry white lead, and oxides, were sold on different bases, although all were sold on a uniform delivered price basis throughout particular territories.

White lead, whether dry or in oil, is essentially a standardized product. Although sometimes one customer, for example, a potter or ceramic manufacturer, will want a slightly different grade than that used by the paint manufacturer, and certain paint manufacturers might want a product of a particular particle size, the Federal specifications for white lead do not permit of substantial physical or chemical difference (Tr. 1073, 1074).

White lead in oil is sold on a basis which differs 408 from that used in the sale of dry white lead. This is the result of practices ancient in the industry and of subsequent historical growth. White lead in oil had been sold to dealers or distributors, until the adoption by National Lead Company and Eagle-Picher Company of the so-called "agency" contracts which will be discussed hereafter (infra, pp. 22-24). National Lead Company, at least as far back as 1920, had a system of differential points, that is, cities or towns located throughout the United States which took a stated differential over the base price. (See Com. Ex. 659-C-P, setting forth the old differential points for the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia and St. Louis Branches of the National Lead Company.) Naturally, the other producers, in order to compete with National, could sell for no more than the price quoted by National Lead at these differential points. During the NRA days there was some discussion about the points as to which a particular differential might be applicable and although there was some discussion about adopting a zoning method for purposes of the Code, no agreement was reached among the white lead producers (which included the respondents in this proceeding) (Com. Exs. 501-A-D, 505-A-B). Nevertheless, sometime between November, 1933, and June, 1934, National Lead Company adopted the so-called "zone method"

(Tr. 1154), which was merely a simplification of the historical differential and equalization point method employed by National Lead at least as far back as 1920. This will be discussed more fully hereafter (infra, pp. 24-27). With the adoption of this method National Lead thereupon sold, either directly or through its agents, white lead in oil on the basis of this zone method, which roughly divided the country into a par and six differential zones (see Com. Ex. 580). Eagle-Picher sold its white lead in oil during the same period on the basis of substantially similar zones, although there were differences, particularly in the Far West (see Com. Exs. 585, 589-A-B). Sherwin-Williams, however, continued to sell through its shipping points which method had been followed by the company since prior to 1924 (Tr. 869-870, 1316-1317); Glidden sold on the basis of differential territories, without using any zone map (Com. Ex. 593; Tr. 1254, 1289, 1293), and apparently
409 it was not until 1937 that International Smelting & Refining Co. used a zone map in the sale of white lead in oil (Com. Exs. 591, 592, 836-E).[1]

Dry white lead in barrels or bags (constituting the most significant method by which dry white lead is sold) was sold by National Lead Company on the basis of two zones, a par zone, a par zone which extended through all the eastern and southern States and a 25¢ per 100 pounds differential zone comprising the western States beginning with the eastern boundaries of New Mexico, Colorado, Wyoming and Montana (Answer of Respondent National to Amended Complaint, Par. 7). As in the case of white lead in oil the other producers could sell at no higher price than National Lead Company if they were to be competitive.

There were also different zones adopted by National Lead Company for red lead and litharge. When these products were sold in less than carload lots there was a par zone comprising all of the northeastern, middle west, and some of the southern States with 25¢ per 100 pounds being added for customers in Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, California, and territories west of the Cascade Mountains in Oregon and Washington, 50¢ for customers in Colorado, Montana, New Mexico and Wyoming, and 75¢ for customers in Arizona, Idaho, Nevada,

1. All of the lead pigments in kegs of 100 pounds or less were also sold on this same zone basis but obviously these smaller keg products did not constitute a significant factor in the industry as a whole.

Utah, and the territory east of the Cascade Mountains in Oregon and Washington. Red lead and litharge in carload lots were sold on the basis of a par zone and a 25¢ per 100 pounds differential zone which included the States of Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Texas, Utah, Wyoming, and the territory east of the Cascade Mountains in Oregon and Washington (Answer of Respondent National to Amended Complaint, Par. 7).[2] Again, if they were to be competitive, the other producers could not sell at prices in the various territories higher than the prevailing prices at which National Lead Company was selling any particular product.

Although undoubtedly there is some similarity in all 410 oxides used in the storage battery business, nevertheless, the testimony was clear from the purchasers called as witnesses by the Trial Counsel for the Commission, that some of these purchasers felt that there were great differences in the quality of storage battery oxides offered by the various producing respondents and in the services they obtained from the various respondents (Tr. 1736, 1738, 1741, 1817-1819, 1852, 1854).

D. Price Leadership of National and Similarity of Prices:

As we have stated, when analyzed, the record is barren of any evidence showing exchange of price information or price factors either directly between the respondents or through the agency of Lead Industries Association. Similarly, there is no evidence showing any agreement or concerted action with respect to fixing prices. The present record before the Commission indicates, however, that the price leader in the field of lead pigments was National Lead Company.

During the so-called "normal period", 1936 to 1941, the record shows National produced slightly more than 60% of the white lead in oil, from 30%-35% of the dry white lead, and approximately 50% of the oxides, red lead and litharge. National Lead Company has five plants producing white lead and nine plants producing oxides. None of the other producing respondents had as large a production as National Lead, although the percentage of business done by some, notably Eagle-Picher and Glidden, was substan-

2. Sometime during 1941, Arkansas and Oklahoma, which had theretofore been in the 25¢ zone, both as to carload and less than carload lots, were placed by National in the par zone (Tr. 1633-1634).

tial, and none had more than two plants producing either oxides or white lead. Thus, Eagle-Picher had its white lead plant in Cincinnati and its two oxide plants in Joplin, Missouri, and Newark, New Jersey. Glidden had its oxide mill in Hammond, Indiana (Metals Refining Co.) and its white lead plant in Scranton, Pennsylvania (Euston Lead Co.). Sherwin-Williams, although a minor factor in the sale of lead pigments, produced both white lead and oxides only in Chicago, and International Smelting & Refining Co., which did not produce oxides, had its white lead plant in East Chicago, Indiana. It will be recalled that National Lead produced both white lead and oxides in Chicago.

That National's card or list price changes were followed (without agreement or compulsion) by other companies is clearly shown when comparison is made between Commission's Exhibit 655-A-C, card or list price changes for National for white lead in oil reflecting among other factors changes in the New York pig lead price, and Com-
411 mission's Exhibit 658, similar list price changes of Eagle-Picher for white lead in oil from 1936 to October 1, 1939. A comparison of these two exhibits shows the following difference in dates of list price changes:

Price	Date of National's	Date of Eagle-Picher's	
$13.00	3/ 1/37	9/14/37	
12.50	10/19/37	10/20/37	
11.75	1/10/38	1/11/38	
11.25	3/10/38	3/11/38	
11.75	9/26/38	10/ 1/38	
12.25	2/27/39	3/ 1/39	
12.75	9/26/39	10/ 1/39	
13.25	4/26/41	5/ 1/41	(Comm.'s Ex. 660-H).

Similar results are shown by a comparison of National's card or list price changes for white lead in oil with those of the other producing respondents (Com.'s. Exs. 663-K, 662-A-Z-26, 661-A-Z-194, 738-A-M). Obviously, a competitor would be able to secure from the trade list price changes announced by National and be in a position to follow those card or list prices as of the effective date.

There is no proof whatsoever of any agreement on the part of the other producers to "follow" National's card or list prices and no proof of any compulsion practiced by

National upon those companies. Obviously, therefore, National's card or list prices were "followed" by the other producers as a matter of individual economic choice.

As for oxides, they have been sold by National for many years on the basis, generally, of $1.50 per 100 pounds over the New York pig lead price for litharge and $2.50 per 100 pounds over the New York pig lead price for red lead (Tr. 1635, 1636). Changes in oxide prices, so far as National was concerned, were made from time to time when the market for pig lead advanced or declined as much as 5¢ per 100 pounds but no change in card prices was made until pig lead prices had changed 25¢ per 100 pounds (Tr. 1637-1638). Here again, with National doing approximately 50% of the oxide business and having nine plants producing that material, the other producing respondents could not sell at any price higher than National's if they wished to obtain any of the oxide business.

412 Commission's Exhibit 655-A-C, referred to above, clearly indicates, we submit, the absence of any price fixing monopoly. The typical monopoly price is one which is fairly rigid and maintained at a high level without regard to costs, the law of supply and demand, or competitive conditions within and without the industry. Commission's Exhibit 655-A-C shows clearly that neither of these conditions existed in the prices at which National offered white lead in oil. For example, as of January 2, 1931, National quoted a card or list price for white lead in oil at $13.25 per hundred pounds while the average pig lead price for the preceding six months was approximately $5.25 (Com. Ex. 655-A). Yet in 1937, as of October 19 of that year, National quoted a card or list price for white lead in oil of $12.50 per hundred pounds compared with an average pig lead market price for the preceding six months of approximately $6.15 (Com. Ex. 655-C). The lower card price in 1937, as against the higher pig lead price, reflects the downward trend in the demand for white lead in oil which began in 1936 (Com. Ex. 851-A). By contrast, compare the rigid prices established by the Big Three Tobacco Companies in *American Tobacco Co.* v. *United States*, 90 Law Ed. 1095. There (at p. 1108) the Supreme Court pointed out as significant the fact that in 1931, when the tobacco leaf was selling at its lowest price during a period of twenty-five years, the so-called Big Three raised simultaneously the list price of cigarettes

from $6.40 to $6.85 per thousand. Again, in *United States Maltsters Ass'n* v. *F. T. C.*, 152 F. (2d) 161 the Court, after referring to the fact that barley represented from 80 to 85% of the cost of manufacturing the malt, stated (p. 163): "While the cost of such barley has varied considerably, the price at which the members [of the Maltsters Association] sold their malt remained the same."

Briefly summarized, therefore, all of the vast amount of documentary evidence introduced by trial counsel for the Commission as to prices shows merely the existence of substantial identity of card or list prices among the producing respondents with a demonstrated price leader, National Lead Company.

E. Lead Industries Association:

Lead Industries Association was organized as an unincorporated association in November, 1928 (Tr. 996-413 997). During the period involved in this proceeding its membership included more than fifty companies, among whom were these respondents (Com. Ex. 498-A-K). It included not only mining companies but smelters, refiners and other companies, as well as manufacturers of lead pigments, some of whom are respondents in this proceeding (Tr. 997).

According to the testimony of Mr. Wormser, Executive Secretary of the Association, the white lead group of manufacturers was not active in Lead Industries Association until the days of NRA. This group became inactive after the decision of the Supreme Court in the *Schechter* case and did not again become active until the advertising promotional campaign of 1937 or 1938 which was designed to stimulate the use of white lead (Tr. 997-998).

From the time the Association was formed, the manufacturers of lead pigments filed monthly reports showing volume of sales and production and stock on hand, but prices were never reported to the Association (Tr. 1083, 1330; Com. Ex. 836-J). The Association in return compiled only an overall statistical survey of the industry which it circulated to the members (Tr. 1330, 1331; Com. Exs. 670, 836-J). The report from the Association to the members did not in any case show individual shipments, production or stock on hand, and it merely gave an overall total combined figure for each respective category. It did not issue any publication to the trade setting forth pur-

ported current market quotations on lead pigments (Tr. 1039) and it did not furnish information or quotations on lead pigments to any trade publication (Tr. 1040).

It is clear, therefore, that the Lead Industries Association was never used either by these respondents or by the other members as a medium to exchange price factors or individual production factors, as a means of curtailing production, or in any other manner as a means of "tampering with the price structure".

F. NRA Days and the Code:

The Circuit Court of Appeals for the Seventh Circuit, in *Aetna Portland Cement Co.* v. *Federal Trade Commission, supra,* held that activity of the members of an industry during the NRA Code days could not be used as the basis of a charge of monopoly either during that period or at any other time (157 F. [2d] at 549). The only 414 evidence in this case showing any sort of concerted action is concerned with the activities of these respondents and others during the Code days. Certainly those activities alone are not competent to prove any of the charges of the amended complaint.

1. Committee Meetings.

The Lead Pigments Division of the Lead Industries Association, which had been charged with the duty of writing and submitting an appropriate code, met on various occasions from July, 1933, to January, 1934. There were two committees of the Lead Pigments Division, one, the so-called Dry Products Committee, and the other, the White Lead in Oil Committee (see Com. Exs. 501-A-D, 800-A-C).

Apparently the main work of the Dry Products Committee was concerned with drawing a supplementary code dealing with conditions of sale for oxides in carload and less than carload lots (see, e. g., Com. Exs. 504-A-B, 801-A-B).

The White Lead in Oil Committee not only discussed such terms and conditions of sale for dry white lead (Com. Exs. 803, 804) but also discussed many other problems. Among the problems was the use of the so-called "agency plan" which had been used in the first part of 1933 by National and Eagle-Picher in their eastern territories. Apparently each of these two companies had been able

thereby to eliminate the practice among certain dealers of selling white lead in oil below cost and as a loss leader (see infra, pp. 22-24). At the same meeting at which the agency plan was discussed the question of freight differentials was also discussed and it was suggested that a zone basis might be worked out (Com. Ex. 501-A-D). No agreement could be secured on the agency method since it appeared that companies other than National and Eagle-Picher were not enthusiastic about adopting this method (Com. Exs. 506-D-F, 712-A-E). Moreover, no agreement was made in regard to zones and the minutes of the White Lead in Oil Committee meeting of October 28, 1933 (Com. Ex. 505-A) stated specifically that freight and zoning problems were discussed "without any understanding or agreement being made". The record shows no further discussions of these two subjects in the period of the Code days or at any other time.

415 Both Committees of the Lead Pigments Division, however, did agree upon a form of the Code (Com. Ex. 809) and on a schedule of standard conditions for the sale of oxides and dry white lead (Com. Exs. 804, 805-A-C).

Deputy Administrator Janssen of the National Recovery Administration suggested a rather drastic price filing section for the Code (Com. Ex. 518-A-B) which the Lead Pigments Division rejected and in place thereof adopted (Com. Ex. 803) Section 2 of Article VII of the Code which provided that each member of the Lead Industries Association engaged in the manufacture and sale of lead pigments should file a list of prices under which his products would be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule A (the so-called Supplementary Code dealing with standard conditions of sale for Oxides and Dry White Lead) (Com. Ex. 809). Any changes in prices or conditions of sale were required to be reported to the Secretary within twenty-four hours, and information supplied the Secretary was to be reissued to the reporting members. However, even this rather mild provision for filing price lists and conditions of sale was not followed. The members of the Lead Pigments Division were not in favor of such action and, therefore, an exemption from the provisions of this section was obtained in June, 1934 and a further extension was requested in September of that year (Com. Ex. 507-A-M).

So far as the record indicates, no price lists or memoranda of sales conditions were ever filed under that section of the Code.

Some of the members of the Lead Pigments Division had consulted counsel upon the question as to whether or not they could follow the standard terms of sale set forth in Schedule A of the Code before the Code went into effect, and while, as one member expressed it, counsel did not give a "go ahead signal", it was felt by most of the members that in view of the fact that the standard terms of sale in Schedule A of the Code "left the question of price strictly a matter between buyer and seller", the members could follow standard conditions of sale without violating any law (Com. Exs. 517-A, 523).

We submit that this is indicative of the ever-present thought in the minds of the members of the Lead Pig-
416 ments Division (even in the Code days, when limitations on price competition and production were openly advocated by the N. R. A.) not to do anything which might contravene either the letter or the spirit of any statute prohibiting restraints upon trade.

Moreover, in the minutes of the Dry Products Committee meeting of October 27, 1933, where the standard conditions of sale for oxides and dry white lead were discussed and drafted, it was agreed "in deference to existing statutes, that no reference to prices should appear in the outlines [i. e., conditions of sale set forth in Schedule A of the Code] except for the specification that 'prices were to be agreed upon between buyer and seller'" (Com. Ex. 504-B). An examination of Schedule A of the Code (Com. Ex. 809) reveals that the standard conditions of sale for both oxides and dry white lead contain no price fixing conditions. Article I, dealing with the sale of oxides in lots of less than 20 tons (less than carload lots) provides merely that the price shall be the seller's card or quoted price in effect on the date the order is received with an allowance of "not more than" ½¢ per pound for minimum shipments of 5 tons, and that red lead containing 97% and 98% PB_3O_4 should be sold at "not less than" ¼¢ and ½¢ respectively over the seller's price for grades of lower PB_3O_4 content. Article II, dealing with conditions for the sale of oxides in carload lots, provided that the price should be determined "by adding a differential, as agreed upon by Buyer and Seller" to the price of common lead at New

York. Article III, which deals with dry white lead, provided that the price thereof should be the seller's card or quoted price in effect on the date the order was received. The Code itself (Com. Ex. 809) therefore did not provide for any fixing of prices. Of course, we concede that if the members of the Lead Pigments Division had filed price lists or their respective variations from the Code terms of sale, as required by Section 2 of Article VII of the Code, this might possibly have had some indirect effect upon prices, but, as we have seen, the members of the industry specifically requested and received an exemption from the requirements of this Section and there is no proof that price lists or terms of sale were ever filed. True,
417 after the termination of the Code, National and Eagle-Picher in general followed the terms of sale with respect to oxides and dry white lead which had theretofore been incorporated in Schedule A of the Code (Tr. 1607-1617, 1650-1654, 1657-1659), but there is not a scintilla of evidence or any proof from which any inference might be drawn that this was done collusively, or in accordance with any "planned common course of action" or by agreement, conspiracy or otherwise than voluntarily.

2. Agency Contracts.

For many years the white lead in oil business had suffered from the actions of certain dealers who sold white lead in oil to the retail trade at a price below cost to the dealers themselves, thereby demoralizing the industry (Com. Exs. 506-D, 706-F). Leaders of the industry had been well aware of this situation, which, as one of them said, "threatened to engulf it [the industry] completely" (Com. Ex. 712-A).

In January, 1933 National and Eagle-Picher experimented with agency arrangements in their eastern territories and during that summer exchanged information as to their success in eradicating the evil of selling white lead in oil below cost (Com. Ex. 712-A). Apparently the dealers of National were well satisfied with the agency arrangement and National so informed Eagle-Picher (Com. Exs. 684, 686). During the course of the Code negotiations, agency as a feature of the Code was discussed (Com. Ex. 501-A-D), but many of the manufacturers of white lead in oil objected thereto; in fact, Sherwin-Williams and Glid-

den were "radically opposed" to the idea because of its consignment feature. (Com. Ex. 506-E). Nevertheless, National and Eagle-Picher, which had experimented each with the agency methods of selling with success in eradicating the evils, each extended its method on a nationwide basis[1] in November, 1933, and in October National notified Eagle-Picher that it so intended to extend its agency method (Com. Ex. 599).

The agency method of selling was to appoint a reliable dealer as a manufacturer's agent to sell white lead in oil (Com. Ex. 595), title to which was to remain in the
418 manufacturer (see, e. g., Com. Ex. 613-A-C). The agency, however, was not exclusive and the agent was free to handle the goods of other manufacturers (Com. Ex. 506-E). The agent agreed to sell the manufacturer's white lead in oil at a stated price and he was to be compensated therefor by the difference between a stated amount and the price at which he sold the product to the purchasers in the retail market (Com. Ex. 613-A-C). Sales were periodically reported by the agent, who was thereafter billed for the goods sold by him upon the basis of the commission differential just mentioned (Tr. 638; Com. Ex. 752-A-Z-144).

The agency contract was based upon that used by the General Electric Company in its sale of Mazda lamps (Com. Ex. 506-D), which had received court approval in *United States* v. *General Electric Co.*, 272 U. S. 476. As stated by an official of Eagle-Picher, it was felt that this method was the only "legal means" by which the extremely dangerous situation, threatening the very existence of the industry, could be cured (Com. Ex. 706-F).

There is no question but that National and Eagle-Picher informed each other as to their practice and experience in establishing the agency method. There is, however, no proof of any compulsion exerted by either company upon the other, nor is there any proof or even suggestion that, during the course of this interchange of information as to the agency method, there was any agreement or "planned common course of action" either to adopt the agency plan or to fix basic prices at which white lead in oil would be sold to the public under the agency plan.

Some time in 1939 (Com. Ex. 649-A-C) Glidden also be-

1. Except that National never used the agency method on the Pacific Coast (Tr. 1091).

gan to sell through distributors under a distributor agreement whereby title to the white lead in oil remained in the manufacturer until sold by the distributor to the particular purchaser (Com. Ex. 650-A-C), but there was no proof that Glidden ever sold any substantial percentage by this method. Sherwin-Williams remained opposed to the idea, for it never adopted any agency method. This is hardly strange, since Sherwin-Williams sold to the public mainly through its own retail stores located at various cities throughout the country (Com. Ex. 652-A-L; Tr. 869-870).

International Smelting & Refining Company did not
419 adopt the agency method but did sell white lead in oil on consignment beginning in November, 1932 (Com. Ex. 836-E).[1]

3. Zones.

National Lead Company sometime between the fall of 1933 and June, 1934, adopted a zone method of selling white lead in oil (which also applied to other keg products of 100 pounds or less, insignificant factors in this proceeding) (Tr. 1154; Answer of Respondent National to Amended Complaint, Par. 7). This was an outgrowth of selling on the basis of equalization and differential points which, as the record shows, was the practice at least as far back as 1920. Commission's Exhibit 659-C-P shows that under the system of differential and equalization points certain cities in various territories took a differential price over the base price and freight charges for shipments to points other than those named as differential or equalization points were "equalized" with those particular cities. At a meeting of the White Lead in Oil Committee during the Code days in August, 1933 (Com. Ex. 501-A-D), there was some discussion among the members of the white lead in oil group as to just what cities or points took on the differential over par or base price. Apparently there was no uniform practice among the manu-

1. In addition, National Lead Company also sold white lead in oil under its Dutch Boy label under Fair Trade Agreements (Com. Ex. 619-A-C) where such was permitted by State law (Com. Ex. 576-A-E) pursuant to the provisions of the Miller-Tydings amendment to the Sherman Act (15 U. S. C. A. Sec. 1). However, we fail to see how this is of any relevance in this proceeding.

The record indicates that National discontinued the agency method in January, 1944, and Glidden its distributor method in July, 1942 (Com. Exs. 624-A-B, 651).

facturers and it was then suggested that a zone method might be worked out. In September, 1933, Mr. Maston of Eagle-Picher Company wrote to Wormser, Executive Secretary of Lead Industries Association, enclosing a proposed map together with the differential and equalization points list used by Eagle-Picher (Com. Ex. 513-A-E). He stated that he was forwarding this map and the list to Anaconda, Sherwin-Williams, Euston Lead and Wetherill. It was also stated that National Lead Company was fully informed of the details and was gathering further data on this important matter. The other companies were to 420 submit their suggestions at the next group meeting.

However, at the next meeting in October, 1933, although freight and zoning problems were discussed, no understanding or agreement could be reached (Com. Ex. 505-A-B). The suggested zone map and the differentials appearing thereon which Maston forwarded to the various companies (Com. Ex. 513-E) were not the map and differentials ultimately adopted by National Lead Company (Compare Com. Ex. 580).

The record does not indicate when a zone method was adopted by either National Lead Company or Eagle-Picher Company, and the only testimony upon this point is that zones were adopted by each company sometime between the fall of 1933 and June, 1934 (Tr. 1551, 1579-1581). The zone methods adopted by National Lead and Eagle-Picher differed with respect to the states in the Rocky Mountain and Pacific Coast Areas (Compare Com. Ex. 580 with Com. Exs. 585, 589-A-B). The zone map used by National Lead was simply a simplication of the differential and equalization point method which National Lead had used as far back as 1920 (Com. Ex. 659-C-P). Obviously, under the old system, there was some attempt to approximate an average of freight rates applicable between established shipping points and the particular differential or equalization points. The zones adopted by National Lead for its white lead in oil business represent in substance a graphic presentation of the old differential and equalization points system, and in almost every instance it will be found that under the zone differential method the differential quoted for any particular point was the same or less than the differential quoted under the old system of differential and equalization points (Com. Ex. 808-H).

There is a wealth of documentary evidence in the record

dealing with freight rates but we believe the most accurate summary thereof will be found in the Commission's Exhibit 751-A-F. While no attempt will be made here to present a detailed chart, we submit that, if the Commission picked out any particular shipping point and any point of destination, it will see that in almost every instance the differential on the zone map of ½¢, ¼¢, ½¢, ¾¢ per pound, or whatever the differential may be, is less than the difference between the average freight in the par zone and the freight to the differential zone. It is therefore apparent that National Lead in adopting its zone method
421 made an honest attempt to have the zone differentials not exceed the increase in the average freight charge per pound in those areas.

So far as dry while lead is concerned, National Lead had only two zones, a par zone, which extended to the far western states, which in turn comprised the 25¢ zone (*supra*, p. 14). It does not appear in the record whether this was the result of the adoption of any zone map as such, nor does it appear when this method of selling dry white lead was first used by National Lead.

Oxides were sold by National Lead on the basis of two zoning methods, one which applied to less than carload lots and another to carload lots (*supra*, p. 14). Again, it does not appear when this method was first used by National Lead or when it was first used by any of the other producing respondents.

The reasons for the use by National Lead of different zones for different products are not difficult to ascertain. White lead in oil was sold through agents or dealers located in many cities throughout the United States. Dry white lead, however, for the most part, was shipped directly from the plant or warehouse to the customer (Tr. 698). An examination of the tabular resumé of National's invoice data (Com. Ex. 752-A-Z-144) reveals that, in most instances, dry white lead was shipped in large quantities. Moreover, freight rates on dry white lead, in most instances, were from 25% to 30% lower than those for white lead in oil (Com. Ex. 751-B). Taking these factors into consideration, therefore, National Lead sold dry white lead on the basis of a larger base or par zone. The same considerations applied to the zone basis used by National Lead for the sale of oxides in carload lots, while the sale of oxides in less than carload lots on the basis of four zones would reflect a portion of the increased costs of

transportation for the shipment of such quantities (the established rates for less than carload lots frequently being as much as 40 or 50% more than the carload rate [Com. Ex. 751-A]).

There is no showing that at any time there was any agreement among any of the respondents to adopt any particular zone map or the zone method used by National Lead. Eagle-Picher used a similar zone map with respect to white lead in oil so far as the territories east of the
423 Rocky Mountains was concerned (Com. Ex. 585). While Eagle-Picher quoted a similar differential for the far western states on dry white lead, it made no sales in that area (Tr. 1576), and, apparently, so far as oxides are concerned, Eagle-Pitcher employs a system which differs from that of National Lead (see paragraph 13 of answer of Eagle-Picher to amended complaint). Glidden does not use zone maps but sells all of its lead pigments on the basis of such differential territories as are dictated by competitive considerations (Com. Ex. 593; Tr. 1254, 1289, 1293), although, as alleged in its answer to the amended complaint (Paragraph Eighth) its sales of certain of the lead pigments in certain territories are negligible or non-existent. Sherwin-Williams used no zones whatever for white lead in oil but had "shipping points" which carried a differential over its base price according to the location of the particular shipping point. For example, it had five shipping points in Texas (Com. Ex. 778-A). It maintains warehouses in twenty-five cities (Com. Ex. 775-A-B) and since 1933 from seven to twenty such shipping points in the northeastern states alone (Com. Ex. 662-W-2-26). It was the general custom and established policy of Sherwin-Williams for the purchaser to pay the freight from the nearest shipping point (Tr. 1529). International Smelting & Refining Company, so far as white lead in oil is concerned, apparently did not use any zone map until 1937 (Com. Ex. 836-E). International's zone method for dry white lead was first used in October, 1935, when two zones were set up, a par zone, and the Pacific Coast which carried a differential of ½¢ per pound (Com. Ex. 836-I).

There is thus no proof of any agreement or "planned common course of action" among the respondents with respect to the adoption of zones or differential territories.

422 In the above discussion we have not referred to Commission's Exhibit 519-A-B. Commission's Ex-

hibit 519-A is a letter, dated February 2, 1934, from Mr. Wormser, Secretary of Lead Industries Association, to Mr. Maston, Vice President of Eagle-Picher Company, in which Mr. Wormser expressed his thanks to Mr. Maston for mailing him a copy of the zone map for the "White Lead-In-Oil Industry". Commission's Exhibit 519-B is a letter dated January 31, 1934, from Mr. Maston to Mr. Wormser, which reads as follows:

> "I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self explanatory.
>
> When new points are set up or any suggested change in the differential made they can in the future be passed through your office.
>
> From this map we will eventually build up an official freight arrangement for this division of the lead industry."

The evidence does not show what the zone map enclosed by Mr. Maston was, or whether it corresponded to any zone map ultimately adopted by any respondent. We repeat that the record does not show what map Mr. Maston referred to in his letter of January 31, 1934 (Com. Ex. 519-B) nor has any such map been identified or received in evidence. The letter was written during NRA days and for all that the record shows it would seem to represent a further effort by Mr. Maston to induce the Lead Pigments Division to adopt or include in the proposed Code (still under consideration in January, 1934) a zone map for white lead-in-oil producers; an effort similar to that evidenced by his letter to Mr. Wormser of September 14, 1933 (Com. Ex. 513-B). We say this pointing out again that the maps adopted by National Lead Company and Eagle Picher differed; that International Smelting & Refining Company did not use any zone map until 1937; that Sherwin-Williams and Glidden never used maps. The record shows, as we have said, that Sherwin-Williams did not sell white lead in oil on a zone basis but rather used "shipping points" carrying differentials over its base price. Furthermore, there is no evidence that "When new points are set up or any suggested change in the differential made they" were "passed through" Mr. Wormser's office.

G. Documents Apparently Relied on by Trial Counsel for the Commission:

We have heretofore stated that there is no evidence, documentary or otherwise, showing any exchange of price information among the respondents. From the remarks of counsel for the Commission at various times during the hearings, however, we believe that he will attempt to rely upon the documents discussed below to support his
424 contention that information as to prices or price factors was exchanged between the respondents. An examination of these documents will reveal, we submit, that they in no wise support that contention. In any case, it is certain that they are not "reliable, probative and substantial" evidence to support that conclusion.

(1) So-called "Specimen" Letter from Pacific Coast Branch of National Lead Company dated January 26, 1937 (Commission's Ex. 581 A-E).

This exhibit, a series of letters and schedules constituting "Notice to the Trade", related to price changes as to certain of National's products which were to become effective on the date of the so-called specimen letter, January 26, 1937. The notices were addressed to the San Francisco, Oakland and San Jose trade by National Lead Company's Pacific Coast Branch. They related only to prices in the territory of the Pacific Coast Branch. Copies of these papers were located by any attorney examiner for the Federal Trade Commission in the files of Eagle-Picher (Tr. 299). There is no testimony as to how they arrived in the files of Eagle-Picher. Moreover, we fail to see its significance in any event, since the letter, dated January 26, purports to announce an advance in prices for the Pacific Coast Branch territory for white lead, white lead in oil, red lead, both dry and in oil, and litharge in 100 pound kegs or smaller packages effective as of the date of the letter itself. The fact is that Eagle-Picher had already changed its prices as of January 1, 1937 (Com. Ex. 658). Hence nothing could be more far-fetched than to claim that these papers establish an agreement or "planned common course of action" to fix prices between National and Eagle-Picher.

(2) Telegram from Pacific Coast Branch of National Lead to Eagle-Picher dated March 12, 1941 (Commission's Ex. 701).

This was a telegram from Scott, of the Pacific Coast Branch of National Lead Company, to Hayt, of the Eagle-Picher Company, stating that "effective immediately" the "Manila" (presumably Philippine Islands) prices of white lead in oil and dry red lead in 25 pound kegs had been increased ½¢ and that the price was "now" 10½¢
425 (presumably per pound). Again, there is no showing as to why this telegram was sent but in any event we fail to see how some isolated instance relating to an increase in certain prices in Manila could possibly be relevant to any issue involved in this proceeding.

(3) Letter dated December 14, 1933 from National Lead Company to Sherwin-Williams Co. of Canada, Ltd. (not a respondent) (Commission's Ex. 525).

This was a letter from the main office of National Lead Company addressed to the Canadian company above named enclosing a price card "mailed to the trade today" announcing a change in the price of dry white lead and basic sulphate in amounts of less than 20 tons. There is no proof to show any connection between Sherwin-Williams Co. of Canada, Ltd. and The Sherwin-Williams Company which is a respondent in this proceeding.[1] For all that appears, the Canadian company was merely another customer and a member of the general "trade" to all of the members of which apparently a price card had been mailed. Obviously, therefore, this exhibit is wholly irrelevant and immaterial.

(4) Letter from Hayt, Eagle-Picher, to Reque, National Lead Company, dated July 26, 1940 (Commission's Ex. 710) and reply thereto dated July 30, 1940 (Commission's Ex. 708).

The letter from Hayt of Eagle-Picher of July 26, 1940, addressed to Reque of National Lead in Chicago, refers to a telephone conversation between the two parties and states that the new white lead paint which Eagle-Picher was trying out was still very much on a "experimental

1. At the hearing where this exhibit was introduced, counsel for respondent Sherwin-Williams stated that that company, on December 14, 1933, did not own the controlling interest or any substantial portion of the stock of the Sherwin-Williams Company of Canada (Tr. 602).

basis", particularly from the marketing angle. Among other things, the letter sets forth the list price at which Eagle-Picher will attempt to market the product. The reply from Reque of National Lead to Hayt merely expresses appreciation for the letter and Reque's wishes to Hayt for the best of luck. The subject of the letter, of course, is a new ready-mixed *paint* and not the raw
426 material ingredients thereof, one of which would be white lead. The correspondence therefore has nothing to do with any of the products involved in this proceeding. We fail to see how these letters are in any way relevant or material.

(5) Letter from Dice, Eagle-Picher, to Wormser, Lead Industries Association dated November 16, 1937 (Commission's Ex. 696) and reply thereto dated November 19, 1937 (Commission's Ex. 697).

In the letter from Dice to Wormser the writer thanks Wormser for taking him to lunch with Messrs. Wilson and Martino (of National Lead Company). The writer expresses the fear that the conversation might not have been very interesting to Wormser "because the trend which it took involved National Lead and Eagle policies more than industry problems." In his reply Wormser states that he was glad that Dice was able to meet Messrs. Wilson and Martino, and that he was extremely interested in the conversation that took place "for I felt that if we had more of them in our industry quite a few of our problems would disappear." Just what was the topic of conversation is not revealed, but we have never heard anyone claim that to discuss mutual problems or policies with a competitor constituted a violation of any known law. Moreover, in 1937 or 1938, an advertising promotional campaign to stimulate trade in white lead was under way (Tr. 998) and for all that appears, the conversation might have been concerned with this activity. These exhibits, therefore, are not worthy of any further comment other than to state that they are obviously wholly irrelevant and immaterial.

(6) Oil, Paint and Drug Reporter.

Trial counsel for the Commission apparently attempted to show from the testimony of the President of the corporation which publishes the trade paper known as the Oil, Paint and Drug Reporter that somehow or other this

publication was used as a medium to exchange price information among the respondents and thereby to further the alleged conspiracy to fix prices. The attempt was wholly ineffectual and actually turned out to be a "boomerang", to employ the vernacular. Certain pages from the Oil, Paint and Drug Reporter for certain days in
427 May, June and August, 1934, were introduced into evidence (Com. Ex. 808 A-N) and certain of these pages carry current market quotations on various lead pigments. Mr. Auchincloss, President of the corporation which publishes this trade magazine, stated that various reporters for his magazine would attempt to obtain current price quotations from producers of various commercial articles, including lead pigments; that the price quotations were the result of a purely reportorial operation and if a reporter obtained a price change from one supplier he would then check with the others without revealing the name of the first supplier who might be quoting the price change (Tr. 1112, 1116, 1134-1138). In selecting the basic material which was later edited and reproduced in the trade paper, representatives of the Oil, Paint and Drug Reporter obtained information from various sources. This information was later sifted, correlated, edited, and eventually published, so that the final published item might not be the actual information obtained by the reporter from any particular one of the sources he interviewed (Tr. 1137).

H. Testimony of Purchasers:

Trial Counsel for the Commission called various purchasers of dry white lead and oxides who gave testimony which will be summarized below. This testimony apparently was introduced to support the charge in Count II of the amended complaint as to alleged violations of the Robinson-Patman Act, but we respectfully submit that none of the testimony from these witnesses added anything to the case.

(1) Purchasers of White Lead.

At the hearings in St. Louis on July 29 and 30, 1946, certain local paint manufacturers were called to the stand by Trial Counsel for the Commission. All of the manufacturers involved purchased dry white lead and therefore all were in the par territory, since it will be recalled that dry white lead (except as to keg products of 100 pounds

or less) is sold on the basis of a par zone which extends throughout all the east, middle west and south, and as far west as the line formed by the eastern boundaries of New Mexico, Colorado, Wyoming and Montana. From the testimony of these manufacturers it appeared that the white
428 lead content of house paints might vary from three to eight pounds per gallon of paint (Tr. 1367, 1381, 1392, 1397); that some of them did business as far south as Texas and Louisiana (Tr. 1339, 1367, 1368, 1398, 1423); that the raw material cost per gallon of paint might be in the neighborhood of $1.50 per gallon and that the list price thereof would be $2.65 per gallon (Tr. 1346); one of the paint manufacturers sold on a uniform delivered price for any area (Tr. 1346, 1348); a second absorbed a portion of the freight for sales to Texas (Tr. 1401); another added a certain amount to the price for delivery in distant areas such as Texas (Tr. 1368-1369), and one claimed an f. o. b. price St. Louis, the customer paying the freight (Tr. 1423), although on cross-examination this witness had difficulty in explaining his ability to compete with the others who sold at a uniform price both in St. Louis and at distant points (Tr. 1445-1447). The four witnesses called at the hearings in St. Louis were asked whether or not a saving of five or ten cents a gallon on material costs would affect them from a competitive standpoint and their answers may be summarized as ranging between "Yes", to "Perhaps", to "No" (Tr. 1359, 1360, 1378, 1402, 1425, 1426). (Obviously, since all of these purchasers bought their dry white lead in the par zone, and did business only in that zone, the testimony would seem to be relevant only from the standpoint of the so-called "mill net" theory hereafter discussed).

(2) Purchasers of Oxides.

Various storage battery manufacturers were called to the stand at the hearings in November, 1946, held in Chicago, Kansas City, St. Louis, Nashville and Birmingham (Tr. 1672-2018). In addition, certain testimony from a battery manufacturer in Dallas, Texas, was introduced at the hearings in January, 1947, in Washington, by way of stipulation (Tr. 2022-2024).

These witnesses testified that in a standard 15-plate storage battery there would be approximately 23 pounds of lead products of which approximately 10 or 11 pounds

represented lead pigments and the balance antimonial lead (which is not involved in this proceeding) (Tr. 1677, 1680, 1717). All testified that the storage battery business was highly competitive and some testified that a saving of 429 5¢ or 10¢ per battery in material costs would be of advantage to them from the competitive standpoint, particularly in the lower priced 13-plate battery field where the independent manufacturers were subjected to indirect cheap competition of the mail order houses such as Sears, Roebuck and Montgomery, Ward (Tr. 1732-1733, 1879-1880, 1909, 2015). Others, however, stated that such a difference in material costs would have no effect from a competitive standpoint (Tr. 1798, 1866-1867, 1868, 1869, 1898).

All of the witnesses were located in the par zone for oxides except those in Birmingham, Alabama, and the one in Dallas, Texas, who were located in the 25¢ zone. Again, apparently, the testimony was aimed in support of the "mill net" theory and possibly also at the zone system, although the differential per standard 15-plate battery of ¼¢ per pound would be only 2½¢ and would hardly appear to be important from a competitive standpoint.

Some of the witnesses testified that in their opinion there were differences in oxides from the standpoint of performance, and three of them specifically mentioned National Lead Company, which company in the opinion of these witnesses offered storage battery oxides which were definitely superior in performance to those produced by other manufacturers (Tr. 1736, 1737-1738, 1740, 1741, 1817, 1818-1819, 1854-1855). Some of the witnesses further stated that, in addition to purchasing oxides from one or more of the producing respondents in this action, purchases had also been made from the Hammond Lead Company of Hammond, Indiana, which is not a respondent in this proceeding (Tr. 1676, 1702, 1760, 1881, 1915, 2022).

I. Testimony Relating to National Lead Company:

Various documents and other testimony were introduced apparently in an attempt to prove the subordinate charge in Count I of the amended complaint to the effect that National Lead Company, beginning in 1891, the date of its incorporation, had attempted to monopolize the lead pigments industry.

A complete refutation of this charge is found in the

Commission's own proof with respect to the other respondents. Thus, as we have shown, from 1930 on, Eagle-
430 Picher produced from 15 to 20% of the white lead in oil, and 10% of the dry white lead. Glidden purchased Metals Refining Company in 1928 or 1929 and was thereafter able successfully to engage in the oxides business. It acquired Euston Lead Company, manufacturer of white lead, in 1923 and both of those divisions of Glidden are still in business. Anaconda Lead Products Company, the predecessor of International Smelting & Refining Company, began the production of dry white lead in 1919 and the production of white lead in oil in 1931 and, while Sherwin-Williams is a minor factor in the sale of lead pigments, it has remained in the lead pigments business and in 1943 produced 5% of the white lead in oil used in this country. In addition, other companies (who were not named respondents here), such as W. P. Fuller & Son, MacGregor, and Hammond Lead Company were also engaged in the manufacture of lead pigments. In the field of oxides, Hammond and Fuller were two of the principal competitors of National, in addition to Eagle-Picher, Glidden, and those storage battery manufacturers who produced oxides for their own use (Tr. 1647). It is difficult to reconcile these facts with the charge that beginning in 1891 National Lead Company began a program which resulted in a monopoly of the lead pigments industry.

Various exhibits dealing with early meetings of the Board of Directors of National Lead Company were introduced in evidence (Com. Exs. 3-A through 11-D). These showed that some of the Guggenheims were at sometime in the early history of National Lead Company members of the Board of Directors of that Company. There are also documents (admitted over respondents' objections) indicating that the Guggenheims and Thomas Fortune Ryan were among the founders of American Smelting & Refining Company (Com. Exs. 22-A-Z-47, 92). Counsel also introduced in evidence a contract executed in 1906 between American Smelting & Refining Company and National Lead under which National Lead agreed for a period of fifteen years to purchase the bulk of its corroding pig lead requirements from American Smelting & Refining Company (Com. Ex. 93-A-I). That contract of course expired in 1921, and the testimony is that at the present time National Lead purchases the greatest portion of its corroding

pig lead requirements from the St. Joseph Lead Com-
431 pany (Tr. 1069). However, apparently all of this background testimony was put into the record in an attempt to show that somehow or other National Lead Company in its relationship with American Smelting & Refining Company was able to control the market price of pig lead. Just how this evidence tends to support that suggested conclusion it is difficult for us to perceive. As a matter of fact, we regard the allegations of subdivision (8) of Paragraph Seven A, which make this charge, as completely preposterous and wholly unsupported by any proof (even the most remote hearsay, such as were many of the exhibits introduced ostensibly to support this charge).

The testimony of E. A. Behr, for many years Assistant Sales Manager of American Smelting & Refining Company, who had been in the Sales Department of that Company since 1907, makes this abundantly clear. Mr. Behr testified that prices of pig lead were established by American Smelting & Refining Company through its own committee, which considered the law of supply and demand and decided whether prices were too high or too low and recommended any change accordingly. Sometimes price decisions were made by Behr alone; at other times by the Manager of the Sales Department and Behr, and, on occasion, the Chairman of the Board or the President of the Company participated. While National Lead Company was the largest buyer of corroding pig lead from American Smelting & Refining Company, corroding pig lead represented only 25% to 35% of the total lead production of American Smelting & Refining Company. That Company also sold common desilverized lead and chemical pig lead as well as small lots of soft Missouri lead. Electrical manufacturing companies, cable companies and wire companies were also large customers of American Smelting & Refining Company (Tr. 1214-1221).

The amended complaint also charges that National has secured control over a substantial part of the capital stock of Eagle-Picher. It was shown that beginning in August, 1930, shares of Eagle-Picher were transferred to the name of Edward J. Cornish, of National Lead Company, and that purchases were made in his name through June, 1932, at which time the total number of 44,900 shares of Eagle-Picher were in the name of Edward J. Cornish. In

432 February and March, 1937, the bulk of these shares was sold and on March 10, 1937, there remained in the name of Edward J. Cornish 3,500 shares of Eagle-Picher. In February, 1943 these 3,500 shares were transferred to the name of National Lead Company (Com. Ex. 700-A-B). There is no showing of what the total number of outstanding shares of Eagle-Picher Company was at any time during the period 1930-1943. In any event, by 1937 only 3,500 shares were held in the name of Edward J. Cornish who apparently was the nominee of National Lead Company (Com. Ex. 700-A). There is no proof whatever in the record of any action on the part of National Lead indicating the slightest attempt to exercise domination or control of Eagle-Picher or to influence that company in the management or conduct of its business.

Paragraph Seven B, subdivision (7), of the amended complaint sets forth an even more fantastic charge, namely, that National Lead Company entered into contracts and "understandings" with du Pont "for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead." In the first place, the exact nature of the charge set forth in this allegation is difficult to ascertain. We suppose that a translation of this allegation into understandable terms might run as follows: That National Lead, by certain contracts it made with du Pont, thereby (in some occult fashion) helped to maintain the fixed price at which it and other sellers of white lead sold that product. To support this charge trial counsel for the Commission introduced certain contracts between du Pont and National Lead and certain correspondence which amounted to an extension of these contracts. On examination these contracts turned out to be nothing more than conversion contracts whereby for a stated sum, fixed by a formula set forth in the contracts, National Lead agreed to take pig lead belonging to du Pont and convert it into white lead (Com. Ex. 797-C-Z-6). If thereby National promoted "maintenance of the levels of price fixed" by it and other producing sellers of white lead, we simply fail to understand how this was accomplished.

We therefore respectfully submit that there has been not only a complete failure of proof as to the charge
433 of monopoly leveled at National Lead Company as an independent respondent but also affirmative proof to the contrary.

J. Summary.

In the foregoing discussion of the facts, we of course have not made reference to every bit of the testimony or every piece of documentary evidence which has been introduced in evidence, much of which we claim is inadmissible either as hearsay or as irrelevant. We have tried, however, to summarize the testimony relating to the main issues in the proceeding and to give a fair and accurate summary of the proof offered by Trial Counsel for the Commission. We respectfully submit that this summary of the proof to date shows conclusively that the allegations of Paragraph Seven B of the amended complaint, the crux of the Commission's case on the conspiracy or monopoly charge, have not been supported by any evidence and certainly not by the "reliable, probative and substantial" evidence nor by the greater weight of the evidence. Thus, there has been no showing of any combination or conspiracy among the respondents:

(1) To adopt and maintain a system of delivered price quotations;

(2) To adopt and maintain a system of zones;

(3) To secure the cooperation of Lead Industries Association in fixing and adopting non-competitive terms and conditions of sale;

(4) To exchange directly and through the Lead Industries Association price factors and information concerning price factors;

(5) To adopt a system of consignment or agency agreements;

(6) To fix prices and terms and conditions of sale for lead pigments.

Similarly, there is no proof

(7) That respondent National Lead entered into contracts with du Pont "for the purpose of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead."

434 We also maintain that there has been a failure of proof as to Count II of the amended complaint charging violations of the Robinson-Patman Act, and we shall discuss this in Point II (*infra*, pp. 47-51).

Point I.

There is no proof whatsoever of any conspiracy, combination, agreement or "planned common course of action" constituting a price-fixing monopoly within the meaning of the cases.

In view of the summary of the testimony which we have just given, it might appear redundant to discuss the cases dealing with the subject of monopoly, but we believe an analysis of those cases clearly demonstrates that none of the activities engaged in by the respondents in this proceeding amounts to a violation of law.

For the most part, the proof offered by trial counsel for the Commission concerns similarity of card or list prices of respondents and the activities of respondents during the days of NRA. As to the former, we have found no case which suggests that similarity or identity of prices, standing alone, constitutes proof of a conspiracy or combination in restraint of trade. As to the latter, the activities and the discussions at the various committee meetings and the later correspondence among certain of the respondents in connection therewith, were all part of an attempt to draw a workable code which Congress in enacting the National Industrial Recovery Act required that all industries attempt to do. Hence, they are in no way proof of any combination or conspiracy to monopolize the lead pigments trade.

An analysis of the leading cases under the Sherman Act and under Section 5 of the Federal Trade Commission Act, dealing with activities of manufacturers who were members of a trade association, clearly supports the conclusions just referred to. Under the Sherman Act we find the following cases:

Maple Flooring Assn. v. *United States*, 268 U. S. 563 (1925);

Cement Mfrs. Assn. v. *United States*, 268 U. S. 588 (1925);

Sugar Institute v. *United States*, 297 U. S. 553 (1936);

435 *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

Other pertinent cases under the Sherman Act are:

United States v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (D. C., E. D. Mo., 1931);
United States v. *Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A., 2d, 1945).

Of the cases involving Section 5 of the Federal Trade Commission Act, the following should be considered:

Dietzgen Co. v. *Federal Trade Comm.*, 142 F. (2d) 321 (C. C. A., 7th, 1944);
United States Maltsters Assn. v. *Federal Trade Comm.*, 152 F. (2d) 161 (C. C. A., 7th, 1945);
Milk and Ice Cream Can Institute v. *Federal Trade Comm.*, 152 F. (2d) 478 (C. C. A., 7th, 1946);
Fort Howard Paper Co. v. *Federal Trade Comm.*, 156 F. (2d) 899 (C. C. A., 7th, 1946);
Aetna Portland Cement Co. v. *Federal Trade Comm.*, 157 F. (2d) 533 (C. C. A., 7th, Sept. 10, 1946).

In the *Maple Flooring* case, *supra*, the defendants, who manufactured flooring, were members of an association which, among other things, gathered and collated information on the cost of lumber, manufacturing costs, percentage of waste, etc., which was distributed among the members thereof; the Secretary of the Association compiled and distributed booklets showing freight rates; members made weekly reports on sales giving quantity, grade, delivery prices, average freight rate to destination and commissions paid, and the Association reported back to each member such information as to each sale. Similar activities were involved in the *Cement* case (1925), and in both cases the Supreme Court in 1925 held that there was "no prohibited concert of action".[1]

436 In the *Sugar Institute* case activities similar to those performed by the trade associations in the *Maple Flooring* and *Cement* cases were involved and, in addition, as the Supreme Court pointed out, the Sugar Institute took steps to compel its members to adhere to prices which it had announced. The Supreme Court in that case did not condemn announcement of prices and terms of sale. It stated (p. 601):

"* * * The vice in that agreement was not in the

1. *Corn Products Co.* v. *Comm'n*, 324 U. S. 726, 735.

mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, *but in the steps taken to secure adherence,* without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be * * *." (Italics ours.)

At other places in the Court's decision reference is made to "policing" "recommendations of the Institute concertedly observed", "restrictions imposed by the Institute", "obligations to adhere", and "rigid enforcement".

In the instant case the respondents did not even exchange among themselves or through Lead Industries Association information as to prices or terms of sale, the practice which was declared legal in the *Sugar Institute* case. Much less was there here any "policing" or "rigid enforcement" by the respondents either collectively or through the offices of the Lead Industries Association.

In the *Socony-Vacuum* case, *supra,* the respondents were oil companies located in the middle west, who admittedly through agreement among themselves launched upon a plan to buy "distress" gasoline in the east Texas and mid-continent areas in order to maintain the retail prices of gasoline in the mid-west area. While acquiescence on the part of NRA officials was urged, it was shown that the 437 activities continued *by agreement* after NRA was declared unconstitutional in the *Schechter* decision.

Similarly, the recent cases cited above, involving proceedings initiated by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, present circumstances which are entirely different from those obtaining in this proceeding.

In the *Dietzgen Co.* case, *supra,* the respondents were members of an organization known as the Scientific Apparatus Makers of America. In June or July, 1932, they met in Detroit and *agreed* on a price list to become effective July 10, 1933. Thereafter, during the NRA period, the

respondents complied with the Code until NRA was declared unconstitutional. In June, 1935, however, the respondents *again met and agreed* to keep the Code prices in effect, and in October, 1935, they met at Cleveland and agreed that it was unfair to sell for less than the lowest price of any member. A similar *agreement* was made at a meeting in Chicago in June, 1936. The Commission further offered proof showing that the majority of the respondents had submitted identical Government bids in nineteen instances, in sums varying from $3,441.20 to $34,095.50.

In the *Maltsters Assn.* case, *supra*, the Association received from its members daily reports of sales showing the date of sale, destination of shipment, grade and quantity, and the prices received. This information was compiled in the office of the Association and a daily sales report was sent to members showing the name of the seller, the date sold, quantity and grade, and the price received, without, however, identification of the particular buyer or the destination of the shipment. Similar weekly and monthly reports were made to the Association and by the Association to the members. When a member of the Association made an offer to sell at a price different from that at which it had theretofore been selling malt, it advised the Association, generally by wire, of such price change and the Association relayed that information to other members, usually by telegram. Many other activities of the Association members of a similar nature are set forth in the Court's opinion, among them the fact that in February,

1935, a representative of the Brewers Association met
438 with the Executive Committee of the Maltsters Asso-
ciation to discuss an allowance of a cash discount on the purchase of malt which resulted in the quotation of the same cash discount to brewers by all members of the Maltsters Association. Moreover, the President of the Maltsters Association testified that members were expected to maintain the prices filed with the Association until the latter was notified of a change. Indeed, the respondents conceded that their collective activities "constituted an agreement". The Court also adverted to the fact that, although the price of barley, representing from 80 to 85% of the cost of manufacturing malt, varied considerably, "the price at which the members sold their malt remained the same" (p. 163).

In the *Milk and Ice Cream Can* case, *supra,* the Court pointed out that the activities of the Milk and Ice Cream Can Institute followed very closely those under consideration in the *Maltsters* case. The Court summarized some of the activities of the members of the Institute, pointing out that the Institute members used a freight equalization plan and that they did not dispute the fact that this freight equalization system "was used for the express purpose of effecting a uniform delivered price" (p. 481). Similarly, there the members of the institute made a daily report of sales and the Secretary of the Institute took steps to supervise the price activities of the members and would from time to time, upon evidence or suspicion of variation in price, call such deviations to the attention of the members as a whole and from time to time requested members to review their data to determine if price discrepancies were due to errors in compilation. Detailed reports were made to the Institute and upon occasion the members were required to submit evidence as to the correctness thereof. In its brief in the Circuit Court of Appeals the Institute conceded that these reports could not be made "without a planned or agreed common course of action" (p. 482). The Institute moreover established the classification of buyers with a specified discount allowable to each class which the members were expected to follow. These were merely some of the circumstances (which the Court stated it had "merely touched upon") supporting the finding by the Commission that there was an understanding or agreement to do away with price competition.

439 In the *Fort Howard Paper Co.* case, *supra,* the facts were entirely dissimilar from those disclosed by the Commission's own proof in this proceeding. There the NRA Code contained standard practices which covered terms, dating, contracts, freight allowances, standards of length, width, and waste of crepe paper, bulk and package, together with a provision as to prices. This trade agreement was to put into effect in August, 1933, and was followed all during the Code days and *thereafter* by *agreement* among the members of the crepe paper industry. Similarly, minutes of the meeting of the Crepe Paper Association in August, 1933, disclosed that there were three zones established by agreement for certain types of paper, and two zones for packaged crepe paper. There were also provisions for classification of customers with

specified variation in the price lists according to classification and dates set for the price lists to go into effect. Each manufacturer was to publish a price list and send a copy to the Association and there were further meetings during the NRA period confirming prices or re-editing the price lists "so there would be no confusion of prices". Moreover, *after* NRA was invalidated by the *Schechter* decision, the members of the Association met and the minutes of their meeting of June 11, 1935, show that the members *agreed* to continue to operate under the same agreements as were in effect under the Code. On June 2 and 3, 1936, the members discussed the question of adopting a new price structure to simplify the old form and on June 3 a new form of price list was unanimously adopted effective June 8, 1936. The minutes of the meetings held on June 23 and 24, 1937 show that it was agreed to use jobbers' prices with no excess for cutting when quoting on crepe paper cut in pieces. The minutes of the meeting held on May 17, and 18, 1938, show that it was agreed that each member was to phone or wire the Secretary of the Association when its published price list was changed and, in addition, all but one member agreed to send copies of orders and invoices to the office of the Secretary of the Association. Moreover, the record was replete with correspondence between the Association and its members showing the existence of *actual price agreements.*

It was in the light of these circumstances that the Court stated that a conspiracy or combination to eliminate
440 price competition existed and that the zone system there actually established by *agreement* clearly was tinged with "artificiality". In the instant proceeding there is no proof of any such agreement either as to prices or zones or any other aspect of the industry.

It is interesting to note that in the *Fort Howard Paper Co.* case, *supra*, the Court stated (p. 905):

> "* * * True, the mere filing of price lists, or the use of pricing zones, or the existence of an identical or substantially similar price for a standard product is not conclusive evidence of an illegal conspiracy."

And in the instant case none of the producing respondents ever filed any price lists, nor did all of them follow the same zoning system, and the only circumstance here in any way similar to the case just discussed is the existence of substantially identical card or list prices.

We shall make no comment upon the recent *Cement* decision of the Circuit Court of Appeals, Seventh Circuit, other than to say that the members of the Cement Institute went much further in their activities than did the respondents in this proceeding.

In this proceeding, on the proof offered by Trial Counsel for the Commission, there is not one bit of evidence upon which any combination, agreement, conspiracy, planned common course of action, or common concert of action may be predicated, whether directly or by inference.

At all times during the NRA days, the members of the Lead Pigments Division were careful not to violate the statutes prohibiting restraint of trade. Thus, in the conditions of sale set forth in Schedule A of the Code (Com. Ex. 809), it was agreed not to mention prices "in deference to existing statutes" (Com. Ex. 504-A-B). The members refused to adopt the stringent price filing section recommended by the Deputy Administrator of NRA (Com. Exs. 518-A-B, 803, 803-A-C). Instead, they substituted a milder provision for the filing of price lists and deviations from the terms of sale set forth in the Code. Even as to this milder section the members of the industry were not in agreement and in June, 1934, they obtained an exemption from the requirements both as to filing of price lists
441 and the following of the Code terms of sale for oxides and dry white lead. An extension of this exemption was requested in September, 1934:

> "Inasmuch as the Lead Pigments Division has not yet been able to determine upon the modification of Article VII, Section 2 [the section of the Code requiring the filing of price lists and deviations from standard terms of sale] it desires * * *." (Commission's Ex. 507-C, letter from Wormser, Secretary of Lead Industries Association, to Deputy Administrator Janssen of the NRA.)

While the agency method and zones were discussed at Code meetings, no agreement could be reached. In fact, some of the members of the industry were "radically opposed" to the consignment feature in the agency method which resulted in "locking up" assets (Com. Ex. 595) of the manufacturer at various points over the country. Indeed, while National Lead and Eagle-Picher extended the agency method in November, 1933, Glidden made no similar move until July, 1939; Sherwin-Williams never used either

agency or consignment, and International Smelting & Refining never used any agency agreement but had sold on a consignment arrangement since November, 1932. Similarly as to zones, as we have seen, the meeting of the White Lead in Oil Committee on October 28, 1933, shows clearly that no agreement was or could be reached.

Agency methods of course were adopted by National Lead and Eagle-Picher to eliminate the economic evil which resulted from the action of dealers selling white lead in oil below cost. Even had there been an agreement among all respondents as to the agency method, we submit that thereby no violation of law would have been proved under the principle of *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344. Moreover, the zones adopted by National Lead and by Eagle-Picher were not artificial. An examination of National's zones clearly shows that they were developed as an outgrowth and simplification of the old differential and equalization point method, representing an attempt to reflect average freight rates. A look at National's zone map will disclose the careful and realistic
442 account taken of variances in competitive conditions in certain territories. While generally state boundaries form the basis for zone divisions, they are not arbitrarily or artificially followed. The Commission will note the recognition of the existence of competing communities along the Mississippi River and the zone drawing in disregard of State lines to reflect existing competitive territories so as to include comparable territories in the appropriate zone, regardless of state lines, and exclude such as would be inappropriate.

The following language in the recent *Cement* decision, in the light of the facts just discussed, is particularly applicable here (157 F. [2d] 533, 548):

> "* * * We have read all this evidence as it appears in respondents' appendix and if it reveals anything it is the great divergence of opinion which existed between members of this industry. It was with difficulty that many of them were persuaded to agree to what was proposed and done in connection with the Code. In fact, some never did agree. They were a queer lot of conspirators."

Far more aptly might it be said that the respondents in this proceeding "were a queer lot of conspirators".

The significant fact in this case, a fact which clearly distinguishes this proceeding from any of the recent proceedings instituted by the Commission charging respondents with violations of Section 5 of the Federal Trade Commission Act, is that the record shows no meetings of respondents, no "collective" activities, no agreement on any phase of their business, after NRA was declared unconstitutional, and, as we have shown, such activities as respondents did engage in during NRA days in attempting to draft a workable Code were wholly different from the activities of the respondents in the cases just discussed.

There remains the question of the substantial identity or similarity of card or list prices, and on this we refer the Commission to our summary of the facts, where we clearly show, we submit, that under the Commission's own proof nothing more was established than the price
443 leadership of National Lead Company, with the card or list prices announced by National Lead Company in most instances being followed (without agreement or compulsion) by the other producing respondents, a situation which has never been considered illegal (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-199; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil Co. of New Jersey*, 47 F. [2d] 288; *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 605).

Moreover, with respect to the charge that National Lead Company itself was a monopoly, we believe that we have shown that the contrary affirmatively appears from the Commission's own proof. On the percentages of National's production alone the proof shows that the charge has not been supported by the evidence. National's combined percentage of dry white lead and white lead in oil business for the years 1938 to 1941 decreased from 58% to 53% while its oxides business remained in the neighborhood of 50%. Such figures alone would be sufficient to prove that no monopoly existed (*U. S.* v. *Aluminum Co. of America*, 148 F. [2d] 416, 424; *U. S.* v. *International Harvester Co.*, 274 U. S. 693).

We respectfully urge, therefore, that since there has been a complete failure of proof as to Count I of the amended complaint, the Commission should dismiss that portion of the amended complaint in its entirety.

Point II.

There has been no proof of any violation of the Robinson-Patman Act.

Count II of the amended complaint alleges violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. As we have stated, there are two main features under this Count, one dealing with the method of selling on a uniform delivered price basis throughout one zone, and the other dealing with the zone system itself with alleged discriminations resulting where purchasers are located in contiguous or adjacent zones with corresponding differentials. A wealth of documentary evidence was introduced in an attempt to support these charges.

For the most part this consists of summaries pre-
444 pared by Attorney-Examiners for the Federal Trade Commission showing certain selected data gathered by the Examiners from invoices supplied by the respective respondents.

It will be recalled that so far as National Lead Company is concerned there are three zoning methods, one applicable to white lead in oil, one to dry white lead and the other (subdivided into two zoning methods) dealing with oxides. Throughout the East and Middle West (but not the Far West) Eagle-Picher used similar zoning methods while Glidden, although not using zones as such, met competition by quoting similar differentials throughout the particular territories covered by National's and Eagle-Picher's zones. International Smelting & Refining used the same zones for white lead in oil in 1937 and for dry white lead in 1935, whereas Sherwin-Williams sold by shipping points which in various territories carried similar differentials with the customer usually paying the freight from the nearest shipping point.

1. Uniform Delivered Prices.

The charge under this aspect of Count II of the amended complaint is based upon the so-called "mill net theory" developed at length by Professor Fetter[1] of Princeton University. The theory, when announced by Fetter, was an economic one. At the time Congress enacted the Robinson-

1. See, Fetter, *The Masquerade of Monopoly* (Harcourt, Brace, 1931).

Patman Act, there was an attempt made to embody in that Act a definition of price in accordance with the mill net theory, but Congress rejected that definition. This legislative history is, of course, well known to the Commission and is referred to by the Supreme Court in *Corn Products Co.* v. *The Commission*, 324 U. S. 726, at 736-737.

Counsel for the Commission in recent proceedings, as well as this proceeding, have maintained that this alleged economic principle is now embodied in Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The Commission is, of course, familiar with the wording of that Section which prevents discriminations with a proviso to the effect that "nothing herein contained
445 shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *".

The argument of counsel for the Commission is to the effect that the *permissive* language of the proviso is actually a *requirement*.[1] In other words, counsel claims that the proviso, which by its terms permits differentials which make such "due allowance" for differences in the cost of manufacture, sale or delivery, actually should be construed so as to *require* all prices to reflect such differences. Even assuming the validity of this patent distortion of the plain meaning of the words employed in the proviso to Section 2(a) of the Robinson-Patman Act, the argument would still fall without the further assumption that "price" should be defined as "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor", a definition which Congress specifically rejected in enacting the Robinson-Patman Act.

We believe a complete answer to the contention of counsel for the Commission on this point is found in the following language of the Supreme Court in *Trade Commission* v. *Staley Co.*, 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, *or that*

1. See Wooden, *Delivered Price Systems' Defense*, (1946) 15 Geo. Wash. L. Rev. 1, 14-16.

sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price." (Italics ours.)[2]

2. Zones.

In the first place, all the data relating to the invoices which show periodical billing to agents of any of the
446 respondents should not be considered by the Commission, since these do not represent sales. Under the agency or consignment agreements title to white lead in oil remained in the manufacturer until sold by the agent to the retail trade. Obviously, therefore, transactions between any of the respondents and their agents do not constitute sales.

Secondly, there is no proof which shows that the use of zone differentials for white lead in oil (to the extent employed) has involved a discrimination in price between purchasers of similar commodities the effect of which may have been substantially to lessen competition or tend to create a monopoly. Nor has there been any proof showing that the zone differentials did not make due allowance for differences in the costs of sale and delivery resulting from differences in the methods or quantities in which the pigments in question were sold and delivered. It is clear that the zone differentials reflect increasing freight rates and result in price differences which make no more than "due allowance" for differences in such costs.

In this connection, it will be recalled that in *Salt Producers Ass'n.* v. *Federal Trade Commission*, 134 F. (2d) 354 (C. C. A., 7th, 1943), the Court stated (page 358):

> "We must take judicial cognizance of the fact that the Government postal service has established statutory zones and uniform prices fixed within said zones (39 U. S. C. A., §§ 292, 293). Likewise, railroad tariffs are also based on zones."

There are only two zones for dry white lead, one a par zone covering the east and south, and second, covering the

2. Mr. Wooden, Assistant Chief Counsel for the Commission, has stated his belief that this language indicates no more than a "momentary aberration of thought" on the part of the Supreme Court, or at most "dictum", *op. cit. supra*, page 19. We respectfully submit, however, that whether dictum or not, this clear statement of the Supreme Court should be accorded its full meaning by the Commission.

far west. All of the customers of dry white lead who testified purchased their products in the par zone and did all of their business in the par zone.

So far as oxides are concerned, the only testimony with respect to zones other than the par zone came from customers located in Alabama and Texas, where a 25¢ per 100 pound differential exists. Even if the differential were not justified by the increase in freight rates, this would mean, at most, as we have shown, a differential of 2½¢ per standard 15-plate storage battery. Certainly the rule of *de minimis* would apply here.

So far as quantity or functional (i. e., "trade") discounts are concerned, Trial Counsel for the Commis-
447 sion has only shown that there were differences, without showing any facts from which it could be inferred that those differentials might have substantially lessened competition or that they were disproportionate to the direct or indirect costs of sale or delivery. In that connection, we respectfully refer the Commission to the *Sugar Institute* case, where the Supreme Court agreed with the lower court in holding that the refusal to grant quantity or other discounts where the discounts would result in economies to the sugar refiners was illegal (297 U. S. at 594-595).

We respectfully submit, therefore, that as to the zone method and as to quantity and trade discounts there has been no showing of any discrimination within the meaning of the Robinson-Patman Act.

If, however, the Commission feels that the evidence as to zones and quantity and functional discounts submitted by Trial Counsel for the Commission is sufficient to make out a *prima facie* case, which we deny, we respectfully submit that in any case so much of Count II as relates to any alleged discriminations resulting from a *uniform* delivered price be dismissed.

Conclusion.

The Commission should enter an order dismissing the amended complaint.

Respectfully submitted,
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448 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS AND STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

(Received Feb. 25, 1947.)

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451 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

MOTION TO DISMISS.

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their counsel, at the conclusion of the Federal Trade Commission's prima facie case, and move that the Amended Complaint herein be dismissed for the following reasons which are more fully set forth in the accompanying statement and brief:

As to both counts:

1. The practices complained of are proper as a matter of law.
2. The Commission has failed to carry its required burdens of proof.

As to Count I specifically:

1. The alleged monopoly of The National Lead Company constitutes no illegal method of competition by these respondents.
2. The Commission has not substantiated any of the charges of the Amended Complaint by evidence.

As to Count II specifically:

1. The evidence discloses no illegal restraint of trade.
2. The Commission has not conformed to the requirements of due process of law.

452 The respondents respectfully request oral argument of this motion.

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453 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

I. The Complaint Should Be Dismissed as a Matter of Law.

The broad issue before the Commission in this case is a very simple one indeed. The Complaint charges that the respondents have failed to sell lead pigments f. o. b. mill. Count I charges that the failure is the result of the action of National abetted by each respondent and hence, is an unfair method of competing and a violation of Section 5 of the Federal Trade Commission Act. Count II charges that the specified failure is a violation of Section 2 (a) of the Clayton Act.

This broad issue was recently adjudicated in the Seventh Circuit Court of Appeals in the case of *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533:

> "The Commission's order proposes to eliminate the sale of cement on a delivered price basis, notwithstanding the almost unanimous desire on the part of dealers and purchasers that it be so sold. *Instead, it would require that cement be sold on an F. O. B. Plant Basis* * * *. We know of no criticism so often and so forcibly directed at courts, particularly Federal Courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." (Emphasis supplied.)

It is preposterous to require these respondents to now assume the burden of going forward to disprove or
454 rebut charges as to conduct which has been declared unequivocably illegal by a court of high dignity and outstanding experience in Federal Trade Commission cases. The Commission, in the exercise of its judicial function, is obligated to follow the decision in the *Cement* case

as a matter of comity and to dismiss this complaint, regardless of the consistency of this action with the Commission's litigious contentions as appellant before reviewing courts. If the Commission, acting in the capacity of the inferior court, ignores the logic of a reversing decision in a case closely akin, then the Commission is transparently confusing its several functions, the compatibility of which has been critically and repeatedly questioned by outstanding legal scholars.

The Commission has applied to the Supreme Court for a writ of certiorari in the *Cement* case. If this is granted, then the decision of that case by the Supreme Court will profoundly affect both the ultimate outcome and the necessary defensive procedure in this case.

True, the multiple zone system used in the sale of white lead in oil and the quantity discounts applicable to various lead pigments present minor issues not specifically involved in the *Cement* case, but these issues are but incidental to the broader issues which are common to the two cases. The Supreme Court's treatment of the Seventh Circuit Court of Appeals attack on the evidence, findings, and order in the *Cement* case will constitute a guide for the conduct of the present case, not only in respect to issues which are common, but as to all issues involving conspiracy or concerted action.

Hence, the Commission is respectfully urged to decide this motion in conformity with presently existing law and precedent and to dismiss this case, subject to the provisions of Rule XXVI of the Commission Rules, the pertinent portion of which reads:

> "In any case where * * * an order dismissing a proceeding has been issued by the Commission, the Commission may * * * (b) in the case of an order dismissing a proceeding at any time thereafter, give reasonable notice to all respondents and to all intervenors, if any, of a hearing as to whether the said proceeding should be reopened. If after said hearing the Commission shall have reason to believe that conditions of fact or of law have so changed since the said order was made as to require, or that the public interest requires, the reopening of such proceeding,
> 455 the Commission will issue an order for the reopening of the same."

It is respectfully submitted that this procedure should be followed because it will not close the door to the legitimate protection of the public interest, should the law change, but will safeguard these respondents against months of expensive hearings and, likewise, conserve the public resources.

II. The Commission Has Failed to Carry Its Burdens of Proof.

In the present case the Commission has failed to carry its requisite burdens of proof by evidence which would satisfy a court or by evidence even faintly probative, as pointed out clearly and in detail in the brief of the other respondents. The mere superficial resemblance of some of the evidence in this case to evidence suspiciously blessed by reviewing courts in earlier Commission cases provides no reliable precedent here for the Commission as plaintiff, because the overall judicial responsibility of the Commission has been purposefully accentuated in no uncertain terms by the Administrative Procedure Act.

But, this Act is not the sole criterion circumscribing the Commission's lawful power. It is merely a guide defining due process of law for administrative procedures which have no judicial counterparts, and that is not the case here. Count I charges a price fixing conspiracy violative of Sections 2 and 1 of the Sherman Act. Count II charges violation of Section 2 (a) of the Clayton Act. Both of the offenses charges may be redressed by civil (or criminal) action brought in the name of the United States, in a Federal District Court, as well as by the instant administrative procedure. But seldom does an administrative procedure have a full and complete judicial counterpart to serve as a yard stick, as is the case here. The civil sanctions here sought must not be imposed on the basis of proof of lesser dignity than that required in a court proceeding directed to the same acts and seeking the same remedies. Otherwise, due process of law has been effectively circumvented.

456 This argument is not directed to the issue before the Seventh Circuit Court of Appeals in the case of *Marquette* v. *Federal Trade Commission*, 147 F. 2d 589. There is no thought here to recuse the Commission or to suggest that the Departme[illegible] of Justice act in lieu of the Commission, although th[illegible]r cannot be oblivious to the gratui-

tous dicta of the Seventh Circuit Court of Appeals decision in that case:

> "(10) In conclusion, we are not unsympathetic to the criticism directed at the Commission by Marquette, a criticism much aimed at all administrative agencies, to the effect that their multiple functions as prosecutor, judge and jury constitute an abridgment of the cherished right to a fair and impartial hearing. On the other hand, as already pointed out, they are the creatures of Congress and it is not within the province of courts either to emasculate or enlarge the powers which it has conferred. Any appeal for relief should be made to Congress rather than to the courts."

We respectfully submit that when the Commission chooses to act in a case in which the jurisdiction of the Department of Justice is coordinate, as here, then the Commission inherently assumes the full responsibility of the courts in a corresponding action by the Department of Justice. It is respectfully submitted that the evidence of the Commission which constitutes its prima facie case, despite its impressive volume, falls unmistakably short of carrying the burdens of proof required of a plaintiff in administrative procedure or in a court of equity.

III. Count I Charges a Monopoly By National, Which, Even if True, Is Neither the Responsibility of the Commission Nor of These Moving Respondents.

At the time of the passage of the Federal Trade Commission Act, the power to enforce the Sherman Act was deliberately withheld from the Commission by Congress. Later the Commission contended, and the Supreme Court held, that certain types of concerted action might well
457 be unfair methods of competition, as well as violations of the Sherman Act. This opened the door to the Commission which has gradually overlapped the function of the Department of Justice in so far as the civil aspects of Section 1 of the Sherman Act are concerned.

Now, the Commission is contending that the alleged attempt, commencing in 1891, by one lone respondent to monopolize, which is forbidden by Section 2 of the Sherman Act, is not only an unfair method of competition, but the joint responsibility of all of the respondents. The pleading poses a novel issue which makes this proceeding a case of first impression.

Paragraph Two of the Amended Complaint commences:

> "Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States * * *."

Eagle-Picher in moments of bitterness, as well as the Commission, may suspect National of secretly harboring monopolistic ambitions, but neither has any proof and certainly none is contained in the record. In any event, what has National's attempt to monopolize to do with Eagle-Picher and how can National's corporate state of mind constitute an unfair method of competition by Eagle-Picher?

The Commission charges that National has been a monopolistic combine since 1891, that it benefited by the alleged skullduggery of the Messrs. Guggenheim and Thomas Fortune Ryan during early years of this century, that it maintained an illicit relationship with the American Smelting and Refining Company and that its monopolistic position has been contractually supported by E. I. du Pont de Nemours & Company. As far as Eagle-Picher is concerned, the Department of Justice is welcome to dissolve the National Lead Company any time it see fit if, indeed, the facts are as alleged in the Complaint in this case. But Eagle-Picher strenuously objects to being doubly victimized, first by National's alleged impropriety and second by this assault on National by the Commission. Why should Eagle-Picher be penalized for alleged misconduct by
458 National? The Government since 1890, one year before National's founding, has had statutory power to control National. The Commission, since its founding, has had the power to limit unfair methods of competition by National. Why should Eagle-Picher now be attacked because it is asserted that National is an illegal monopoly? There is no legal relationship between the fairness of Eagle-Picher's competitive methods and National's monopolistic position.

National, in its brief, concedes that it is the low cost producer with five white lead plants to Eagle-Picher's one and nine lead oxide plants to Eagle-Picher's two. If National took advantage of its size and cut prices to force Eagle-

Picher out of business, then National would be violating the Sherman Act. But the mere presence in the field of the more powerful competitor does not obligate Eagle-Picher to become the aggressor in a highly hazardous price war or render illegal competitive practices by Eagle-Picher which would be legal in the absence of the alleged monopolistic competitor.

If Eagle-Picher is following National's price or marketing leadership, as may be argued from the record, this policy is not rendered illegal merely because National harbors the intent to monopolize or is attempting to monopolize. In other words, no matter how black National's intent may be, Eagle-Picher cannot be blamed merely for its failure to thwart it and certainly cannot be tarred with a competitor's alleged guilty intent. There is no proof in the record of any corporate intent on the part of National or proof of any knowledge of National's intent on the part of Eagle-Picher.

IV. The Evidence Establishes No Inference That Eagle-Picher Has Participated in an Unfair Method of Competition.

The spurious legal logic of this basic pleading taints and contaminates the subordinate allegations. The remainder of Paragraph Two, Count I, which follows the portion previously quoted reads:

"and with having combined, conspired and cooperated with the other respondents to hinder, lessen and elimi-
459 nate price competition in the sale of lead pigments in the United States. It and each of the other respondents are charged with using unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States."

It is to be noted that the charge as a whole is not that the respondents have conspired as a group, but that National has attempted to secure monopolistic control over the price of lead pigments and National has cooperated with each of the other respondents to eliminate price competition. The other respondents are charged at most with contributing to National's delinquency in violating Section 2 of the Sherman Act.

There is absolutely nothing in the record to indicate that Eagle-Picher has been aware of National's cooperation, ex-

cept that as stated, National has not forced Eagle-Picher out of business by cutting prices. Mr. Hayt and Mr. Zoller, both Vice Presidents in the Eagle-Picher organization, testified fully and frankly in this case, and not one word of their testimony indicates any sort of conspiracy or combination to further or participate in National's alleged monopolistic control over prices.

Of course, certain practices became standardized throughout all American industries during the N. R. A. days and Eagle-Picher has not changed these practices, legal per se, and commenced under government sanction. There is no evidence that either Mr. Hayt or Mr. Zoller, who respectively head the white lead and pigment departments of Eagle-Picher, has had any sort of agreement or understanding, engraved or tacit, with officers or representatives of National in respect to either methods of selling or prices.

From the size and the location of the plants of the respective companies it may be readily inferred that Eagle-Picher has not been in a position to commence a different merchandising policy on its own initiative. Why, for instance, would Eagle-Picher, with one of its two major lead oxide plants located at Joplin, Missouri, choose to sell on an f. o. b. basis at Joplin? Obviously, Eagle-Picher must absorb freight to meet National's price, and, as a mat-
460 ter of fact, that is exactly what Eagle-Picher has done; that is, sold f. o. b. Joplin, freight allowed which, of course, is equivalent to selling at a delivered price.

An Eagle-Picher customer located in Chicago wants to use his lead oxide in Chicago, not Joplin, and one cannot sell the customer on how cheap the product is at Joplin. Some plants have higher fixed charges, some higher taxes, some higher rent, some higher labor costs, some higher cost of raw materials, some higher sales cost, and some higher delivery cost. Is Eagle-Picher to be deemed guilty of conspiracy because it has chosen to take advantage of the favorable economic factors attendant to the Joplin location and to absorb the disadvantageous delivery cost?

This discussion is not directed to the Robinson-Patman phase of the case, that is, Count II, but is directed to the question of whether or not these facts establish any inference of conspiracy to uphold National's pre-eminence, in the absence of any proof whatsoever of actual agreement as to prices or methods.

Paragraph Seven A of the amended complaint which is headed "Charges Particularized" is directed entirely to the

alleged monopolistic activities of National and does not concern itself with the other respondents.

Paragraph Seven B charges that "National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of lead pigments in the United States." The charge is not an industry wide conspiracy to fix prices, but, again, cooperation between National and each other respondent. Paragraph Seven A and B merely repeat with greater particularly the charge of Paragraph Two, which has been previously quoted.

The novel issue raised by the pleading of Count I of the complaint really amounts to this: Is an entire industry to be held guilty of indulging in an unfair method of competition because one member of it has achieved a dominant position? The answer is that Congress withheld the power to enforce the Sherman Act from the Commission and that the left-handed effort to enforce Section 2 in this case poses incongruous issues. If it were the charge in this case that

National and Eagle-Picher conspired to fix the prices
461 of lead pigments then the Complaint could have said so

relatively simply. The Complaint cannot now be amended to make this charge because the evidence would not support it.

Is it the unescapable inference of the record that Eagle-Picher has collaborated with National, just because prices and selling methods have tended towards uniformity? No, it is the pleading of the Amended Complaint, itself, that Eagle-Picher is too small to be more than "ostensibly independent."

The Complaint should be dismissed as to Count I because (1) the charge constitutes an attempted usurpation of power over existing monopolies, which is unprecedented and unauthorized and (2) no part of any charge is substantiated by probative evidence.

V. Due Process Requires the Commission to Discriminate Its "Discriminations".

The Commission has failed to maintain its burden of proof as to Count II, that the respondents have violated Section 2 (a) of the Robinson-Patman Act. Not all price variations or differentials are violations of the Act, the requisite conditions being stated in the Act as follows:

"and where the effect of such discrimination may be

substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

There is disagreement between the Second Circuit Court of Appeals and the Seventh Circuit Court of Appeals as to whether or not proving one or more of these conditions is requisite as part of the Government's prima facie case in view of the provision of Section 2 (b):

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section. * * *."

462 The Second Circuit Court of Appeals held in the case of *Moss* v. *Federal Trade Commission* CCA, 148 F. 2d 378, that the mere showing of a price variation shifted the burden of proof to the respondents to justify the variation. On the other hand, the Seventh Circuit in its first decision in the *Staley* case, *Staley* v. *Federal Trade Commission* CCA, 135 F. 2d 453, took the opposite view, stating:

"The Commission seems to think that this element of the offense is a conclusion that follows from discrimination. But it takes discrimination plus the other element as to substantially lessening competition, or tending to create a monopoly, to sustain the complaint. The latter elements are not conclusions to be drawn from the facts of discrimination. They are essential additional elements of fact that must be proved and incorporated in the findings. Congress was dealing with competition, which it sought to protect, and monopoly which it sought to prevent. A showing of discrimination in price is not enough. There must be evidence to support a finding, and there must be a finding based on that evidence, to show wherein competition is substantially lessened or monopoly fostered. It is not every discrimination that is unlawful. Congress knew that all discriminations might have some effect upon competition, but Congress was not dealing with the minor effects of discrimination. The discrimination had to be such that it substantially affected competition.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653. The Commission has failed to make a finding covering these essential elements of the cause of action.

"If there were a finding covering these elements essential to support the order, we find no evidence in the record to support such a finding. There should be evidence to prove in what respect the acts of price discrimination substantially lessen competition or promote monopoly. The Commission cannot depend upon a showing of discrimination alone. Congress was not outlawing discrimination. It was outlawing discrimination only when such discrimination was shown to have substantially lessened competition or promoted monopoly."

We submit that the decision in the latter case is the better judicial reasoning; otherwise, the order drawn might
463 not be based on any finding supported by actual evidence that the critical and limiting conditions of the statute were met. Supposing a company were unable financially to mount the elaborate defense which might be required under the Second Circuit rule. Should such a company be subject to a restrictive order in the absence of affirmative proof of violation of the law?

If Section 2 (b) of the Clayton Act does in fact permit an order without proof, then the statute, so interpreted, is clearly unconstitutional because it is contrary to the due process of law clause of the Fifth Amendment to the Constitution. Any ambiguity or conflict between the requirements of Sections 2 (a) and 2 (b) is certainly resolved by the burden of proof requirement of the Administrative Procedure Act, which provides in Section 7 (c) that " • • • the proponent of a rule or order shall have the burden of proof."

The present record constitutes an apt illustration of the complications and difficulties which would inherently follow the application of the rule of the *Moss* case to a complex case. The record in the present case is replete with thousands of invoices, price cards, etc., of the various respondents. Any two different prices for the same product, not too widely separated timewise, might constitute justification for a finding of illegal price discrimination. Obviously, it would take thousands and thousands of pages of record for the respondents to attempt to justify each pair of dif-

ferent prices. It is difficult to believe that the Commission seriously proposes to place the burden on the respondents of presenting such an elaborate defense.

The procedural problem was discussed informally between counsel for the respondents and counsel for the Commission, and the latter felt that it was only fair to make a statement on the record for the purpose of alleviating the burden. This statement reads as follows:

"Mr. Wright: I stated to counsel yesterday that I would make a statement regarding the issues in this matter, and I pointed out at that time I have no authority to amend the complaint. So that when I speak on this subject, all I can say is what I intend myself to urge in this proceeding as the issues, and I wish counsel would bear that in mind.

464 "I believe it was agreed by counsel yesterday that as to Count I there is no confusion with respect to the issues which are involved.

"When we come to Count II, involving the charges of violation of Section 2 (a) of the Clayton Act, paragraph 6 contains a general allegation of violation of Section 2 (a), and I will agree that under that paragraph, conceivably, almost any violation of Section 2 (a) could be found by the Commission.

"To a more limited extent, the same is true of paragraph 11, which refers to classification of customers, quantity, trade and regional discounts. However, as to paragraphs 7, 8, 9 and 10 of Count 2, I believe it is clear as to exactly the nature of the allegations. In other words, these allegations relate solely to the discriminations which flow from the use of the zone systems as to these various products; and I don't believe the issues raised by paragraphs 7, 8, 9 and 10 could be more clearly stated than they are in the complaint.

"I assume that the confusion which has been stated relates particularly to Paragraphs 6 and 11, and that under the provisions of Section 2 (b) of the Clayton Act, and the decision of the Circuit Court in the *Moss* case, that counsel may feel that it is necessary that an affirmative defense be submitted as to each of the many, many, many transactions appearing in the record where a price difference is shown. I am aware that the record contains a good many instances of de-

parture from the announced terms and conditions of sale in the customary quotations of the respondents, and of the prices, terms and conditions which I contend were adopted by collusion and agreement. Many of these transactions may involve a violation of Section 2 (a), and may be subject to corrective action by the Commission; however, it is my idea that this case is essentially a price-fixing and monopoly case and that that is the essential charge. And I believe it would be unfair to the respondents and to the Commission, too, to encompass within this proceeding a hundred or more unrelated, really, individual price discrimination cases. Hence, I will state that I do not intend to urge to the Examiner and the Commission that these individual instances of discrimination which do not follow the method and the system of the pattern of the announced prices and terms and conditions of sale of the respondents should be considered within this proceeding.

"Now I will state that I consider the discriminations which are alleged in Count II to have the effect
465 of eliminating and suppressing competition between and among the respondents and that certain of the discriminations also have the effect of injuring and suppressing competition in the secondary lines in which customers of the respondent are engaged."

In the first place, this statement is by no means definite, and moreover, counsel for the Commission, in making the statement, frankly pointed out that it was in no wise binding upon the Commission. Now obviously, in the present case, either the Commission should adopt the rule of the *Staley* case, as distinguished from the *Moss* case, or alternatively, should amend the Complaint to conform to the evidence, as permitted by rule, or supplement the complaint by a statement in the nature of a Bill of Particulars to crystallize the issues of the case and advise the respondents which price variations may be regarded as typical, or are to be relied upon by the Commission. If the Commission fails to more fully and formally advise the defendants of the identity of the transactions complained of, then the respondents will have been denied the opportunity to offer defense to specific charges in this case, which constitutes departure from due process of law. The greater the burden of justification shifted to respondents under the *Moss*

case, the greater is the injury to respondents if the burden is indefinite. Sooner or later the Commission will have to identify and interpret the specific evidence upon which it relies. No time except now can be fair to the respondents.

The requirements of due process in administrative law of judicial nature were clearly outlined by Chief Justice Hughes in the case of *Morgan* v. *United States*, 304 U. S. 1:

> "The right to a hearing embraces not only the right to present evidence BUT ALSO A REASONABLE OPPORTUNITY TO KNOW THE CLAIMS OF THE OPPOSING PARTY AND TO MEET THEM * * *.
>
> "No such reasonable opportunity was afforded appellants * * *. Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was 'very general' as he said, in order not to take up 'too much time * * *.'
>
> 466 "Congress in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those FUNDAMENTAL REQUIREMENTS OF FAIRNESS WHICH ARE THE ESSENCE OF DUE PROCESS IN A PROCEEDING OF A JUDICIAL NATURE * * *.
>
> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." (Emphasis supplied)

The *Morgan* case is not a Federal Trade Commission case. That issue was raised before the Sixth Circuit Court of Appeals in the case of *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511. In that case the court stated:

> "(15) The most serious contentions raised by petitioners are that they were not accorded a full and fair hearing and were denied due process (1) because they were not furnished the particulars of the charge as to discrimination, and (2) because they were not granted a subpoena duces tecum as prayed. The right to a full and fair hearing is one of the substantial rights of a litigant, constituting one of the rudiments of fair play. *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, 34 S. Ct. 301, 58 L. Ed. 554. *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304, 57 S. Ct. 724, 730, 81 L. Ed. 1093. It

includes not only the right to present evidence, but also 'a reasonable opportunity to know the claims of the opposing party and to meet them.' *Morgan* v. *United States,* 304 U. S. 1, 18, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129. Cf. *Powhatan Mining Co.* v. *Ickes,* 6 Cir., 118 F. 2d 105."

The court refused to reverse the Commission on this issue of due process of law stating:

"Moreover, petitioners had the right under Section 5 (c) of the Federal Trade Commission Act (Title 15 U. S. C. Section 45, 15, U. S. C. A. Section 45 (c), if they were prejudiced, to apply to this court for leave to adduce additional evidence to explain and justify the transactions found by the Commission to constitute unlawful discrimination. No such application was made. ' The Supreme Court has held that even
467 in case of an arbitrary refusal to receive testimony, when petitioners fail to avail themselves of this right (*Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 226, 59 S. Ct. 206, 83 L. Ed. 126), due process is not denied. We conclude that the petitioners were not refused a fair trial in this regard."

Nevertheless, despite this technical rationalization of the Commission's conduct the court admonished:

"We think that since the statute imposes upon the petitioners the burden of rebutting a prima facie case of discrimination, Title 15 U. S. C. Section 13 (b), 15 U. S. C. A. Section 13 (b), the Commission's counsel should in fairness have specified the individual or group transactions which he claimed constituted unlawful discriminations. He should have stated that he relied on the transactions between Franck, Reily & Company, Merchants Coffee Company, American Coffee Company, Southern Coffee Mills Company of New Orleans, and Golden Gate Supply Company of San Francisco, and other instances of discrimination specified in the findings of the Commission with reference to the selling of granulated chicory of like grade and quality to some customers at materially higher prices than to others, not justified by cost differences."

The present case is far more complex than the *Muller* case in that many more products are involved. In the present case the respondents cannot know how to prepare

their defense, as is evidenced by the quoted statement of the Trial Attorney for the Commission, that the evidence would permit many, many, many more issues than it is his personal intention to urge. Under these conditions it is respectfully submitted that the Commission should here heed the advisory dicta of the Sixth Circuit Court of Appeals rather than pursue a doubtful course which may or may not prove fair, depending upon the Commission's ultimate but still undisclosed position.

468 VI. Competition Among the Battery Manufacturers Has Not Been Restrained.

Despite the doctrine of the *Moss* case, the Commission chose to delineate competitive conditions in the battery manufacturing industry throughout the Middle West. It must be assumed that the Commission, in undertaking the burden of showing the stifling of competition among the customers of the respondents, advanced its strongest possible case. Each and every one of the witnesses testified that the industry was highly competitive and each recognized many, many competitors of his own organization, some large and some small, judging from their names. Incidentally, the name of a company is a poor criterion by which to judge its competitive potency in any given field. For instance, the name of one of the respondents in this case, the Anaconda Copper Mining Company, is an imposing name, yet its participation in the white lead business has been trifling and half-hearted. Thus, as to the competitors of the battery manufacturers who appeared as witnesses, the record provides no clue to the seriousness and dignity of the competition of any particular rival battery manufacturer. But the record is rife with reference to widespread and active competition being existent in fact in the battery industry.

Some of these battery manufacturers testified that if they could save five or ten cents a battery, then they would be better off. Naturally! In general, individual witnesses differed as to whether or not their competitive positions would be improved by a saving so minor as five or ten cents a battery.

The Commission took a day's testimony in Birmingham, Alabama, which consisted of the testimony of two local battery manufacturers. One witness, Mr. McKinley, testified (Record 2003) as follows:

"Q. Mr. McKinley, if you were able to save on

your cost of materials, ten cents per battery, how would that have affected your competitive ability in 1936-1941?

"The Witness: Well, on the quantity of batteries which we were making it would amount to about ten dollars a month, which with us might have made the difference between profit and loss. Of course we are small operators."

469 The second witness, Mr. Burke, testified (Record 2007, 2014, 2015):

"Q. About what was your production of batteries in 1941?

"A. Well, we weren't running but about 300 a month then, two or three hundred a month. * * *

"Q. Mr. Burke, going back now to this period of 1936 to 1941, if you had been able to purchase the materials that went into the manufacture of your batteries, at five cents per battery cheaper than you did, and provided that your competitors had paid what they did, would that have affected your ability to compete in your market area? * * *

"Trail Examiner Norwood: At a saving of five cents on a battery.

"The Witness: Of course in that period five cents ment a whole lot more than five cents does now, and the ability to buy at a lower price, of course, even at five or ten cents a battery, would make the difference between staying in the business and not staying in it."

Thus, Mr. Burke, like Mr. McKinley, testified that a saving which might amount to ten to fifteen dollars a month to his company would have made the difference between staying in business and going out of business. We respectfully submit that any hypothetical lessening of competition by the pricing policies of the respondent clearly falls within the *de minimis* rule.

It is problematical whether or not these witnesses would save five or ten cents a battery if the respondents were forced to sell at mill net, particularly the battery manufacturers located at points remote from the respondents' plants, for instance, those located in Kansas City, Nashville, Birmingham, and Dallas. Whether or not Eagle-Picher could ship from its Joplin plant to compete in the Chicago area under these conditions, is an open question.

The Amended Complaint asserts that Eagle-Picher is so small as to be only ostensibly independent of National. If Eagle-Picher with only two oxide plants is compelled by the order of the Commission to compete with Na-
470 tional, which has nine oxide plants, on the basis of selling at a uniform f.o.b. price, then Eagle-Picher will probably have to relinquish the lead oxide business, as Anaconda, in anticipation of uncertainty, did in respect to the white lead business. If National has been since 1891 the colossus dominating the lead pigment business, as charged in the Amended Complaint, and if the sole fault of the other respondents is *tacit acquiescence* in National's methods and dominance, then obviously, the Commission will not be acting in the public interest if it penalizes Eagle-Picher for the benefit of National.

But apparently the testimony of the battery manufacturers was intended to be related more to the quantity discounts of the respondents than to the freight rate aspects of the case. Also apparently, there is no consistency to the thinking underlying the charges of the Complaint, for a Cease and Desist Order would lead to chaos, not only in the lead pigment industry, but in the paint and battery industries. Whether or not the pieces of the business structure thus blown sky high would, when they came down to earth, happen to form a pattern more conducive to the public weal, is guesswork at best. But to dynamite a business structure in which there is keen, widespread, and active competition, with no thought through theory of constructive betterment, just pious hope, and faith in disruption, is a course which is highly irresponsible.

Naturally, the battery manufacturers are trying to cut their costs generally. Some battery manufacturers operate in lofts, attics, cellars, and abandoned garages. Others have neat plants with lawns and flower beds in front; the cost of the lead oxides going into the battery is but one of many costs and a relatively minor one. It is not sound to infer that the quantity discounts which are available to all purchasers on a uniform basis have *substantially* lessened competition just because a few purchasers tried to assemble batteries without capital or credit.

Section 2(a) of the Clayton Act uses two different words, "discrimination" and "differential" to express prices which are at a variance. For instance, the first two "pro-
vided" clauses of Section 2(a) read:

471 "Provided, That nothing herein contained shall

prevent DIFFERENTIALS which make only due allowance for DIFFERENCES in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

"Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render DIFFERENTIALS on account thereof unjustly DISCRIMINATORY or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit DIFFERENTIALS based on differences in quantities greater than those so fixed and established." (Emphasis supplied)

Differentials are not illegal; only discriminations are illegal. Price differentials are not evidence of discriminations, standing alone. This thought, while not embodied in court decisions, is conspicuous by its absence from court decisions as pointed out by no less a student and authority on the Robinson-Patman Act than Tom C. Clark, himself, Attorney-General of the United States, in an article appearing in the *Harvard Business Review* for the Autumn of 1945:

"Surprisingly, the Court does not appear to have questioned whether 'discriminations in price' and 'differentials in price', as those terms are used in the act, could be two different and independent phenomena, each with a separate meaning (hence the statutory choice of words)."

Price differentials which are published and uniform to all should not be treated, prima facie, as discriminations within the condemnation of the statute but may, if unwarranted, be made illegal discriminations by administrative action of the Federal Trade Commission. In the portion of Section 2(a) quoted above, the second "provided" clause specifies that the Federal Trade Commission may hold hearings and, on the basis of evidence, fix and determine the points at which quantity differentials be-
472 come forbidden discriminations. The Commission has had the lead pigment industry under investigation and

surveillance for over twenty years, but has taken no action to determine the status of the industry-wide discounts utilized in the sale of these pigments. If these quantity discounts have been improper, the Commission has been ignoring its administrative duty for ten years. The Commission brings this drastic action without ever having even investigated to find out whether or not the quantity differentials were discriminatory in fact.

The Commission may take judicial notice of the fact that the freight rates on carload shipments are less than the freight rates on less-than-carload shipments. Delivery cost alone justifies a lower price to the carload buyers. The Commission, as a party litigant, is attempting to shift the burden of justification of the quantity discounts to each individual respondent under Section 2(b) without having performed its own primary duty as an administrative agency, of determining a reasonable quantity discount for the industry as a whole.

Now obviously, if a company makes one deal for a small quantity of goods, and then makes a second deal at an arbitrary and much lower price for a bigger order and competition between the customers is in fact affected, then the seller alone can come up with the figures necessary to determine whether or not that particular deal was an unlawful discrimination. But where, as here, a quantity discount was adopted with Government approval during the N.R.A. and has obtained throughout the industry ever since, and the Commission has the power to redetermine the industry-wide justification for the differential but has not acted, the Commission is in a poor position to attempt to infer now from the type of evidence in this case that the differential has been discriminatory.

The statute clearly specifies that the Commission has power "to fix and establish quantity limits and revise the same as it finds necessary * * * where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly". Now, the 473 testimony negatives any possible thought that quantity differentials have promoted monopoly in the battery business or that the available purchasers in carload quantities are so few as to render differentials *unjustly* discriminatory. The record shows that the respondents have lent assistance to small and obscure enterprises which have prospered in competition with the larger accounts.

The statute as a whole must be taken as the declaration of Congressional intent and policy. Any phrasing of it which may be ambiguous when standing alone must be read in relation to the other portions. Section 2(a) of the Clayton Act evidences no legislative intent to disbar quantity differentials unless monopoly is promoted or the beneficiaries are too few in number for the differentials to be just. Surely the Commission, by acting as a party plaintiff, cannot do what it is not permitted to do when acting in its primary capacity as an administrative body. There is no fairness or justice in the Commission's plaintiff-policy of picking out individual companies as targets for restrictive action when the Commission has administrative powers which might be constructively employed.

In the present case, each respondent is asked to justify its quantity discount individually in respect to every possible pair of transactions, and the number of permutations and combinations of transactions is almost infinite. In the industry-wide procedure provided for in the quoted portions of the statute, quantity discounts can be determined which are fair to the industry as a whole. Otherwise, there is chaos and everyone has to meet the price of the most reckless operator.

Section 11 of the Clayton Act provides for enforcement of the Commission's orders by the appropriate Circuit Court of Appeals. If the Commission has neglected its duty of correcting discriminatory differentials, can it ask the Circuit Court of Appeals as a court of equity to enforce its order? For the Commission, acting in the public interest, is not without other and more comprehensive means of relief, and further, having neglected its own primary duty, is somewhat in the position of a private litigant coming into a court of equity with unclean hands.

474 It is respectfully submitted that the testimony of the battery manufacturers discloses no lessening of competition between the customers of the respondents and that any lessening of competition which might be theorized from the testimony falls clearly within the *de minimis* rule. In fact, as stated, the testimony discloses intense active and widespread competition in the battery industry throughout the entire midwestern part of the United States, which area alone was selected by the Commission for examination.

VII. The Commission Has Proved No Restraint of Trade By Freight Absorption.

The Commission took the testimony of paint manufacturers in St. Louis, apparently in the effort to prove that freight absorption placed the witnesses or their companies at a competitive disadvantage. Apparently, the Commission seeks to draw the inference from this testimony that the witnesses would be better able to compete in the southwestern territory, Arkansas and Texas, for instance, against the local paint manufacturers if the respondents did not absorb the freight incident to the shipments to the local competitors.

The idea that this practice violates the Robinson-Patman Act is humourously ridiculous on its face. Does the Commission, as plaintiff, actually think that Senator Robinson of Arkansas, and Representative Patman of Texas, conspired to sell their constituents down the river to benefit the paint mixing citizens of metropolitan St. Louis! If so, the Commission, as a court, knows better. Frequently, it is necessary for the Courts in passing on a statute to attempt to divine Congressional intent. Mr. Justice Jackson is reported to have remarked during the hearing in the Lewis contempt case, that some of his colleagues seem to be preoccupied in psychoanalyzing Congress. It should require no Freud to surmise that the Commission's present litigious position is enough to make Senator Robinson turn over in his grave.

The Commission owes a duty to these respondents to protect them against having to defend against a charge which is absurd on its face and does violence to the most elemental horse sense.

475 How could the Commission have chosen more potent testimony to undermine its own position! The paint grinders in St. Louis and the paint grinders in Arkansas and Texas pay exactly the same delivered price for dry white lead. The St. Louis manufacturer, in order to sell in Texas, must in one way or another absorb the freight charges to Arkansas and Texas, whereas the Arkansas and Texas manufacturers have had the freight charge on the heavy ingredients of their products absorbed by the respondents.

Concededly, this gives the Texas manufacturer a competitive advantage in Texas, but on the other hand, if the respondents sold at a uniform price, f.o.b. mill, without

freight absorption, the Texas paint manufacturers might be out of business. The paint industry would have to be centralized in the proximity of the pigment producing plants of the respondents. Perhaps this might be to the respondents' advantage, but it is highly debatable as to whether or not it would be to the advantage of the public as a whole. In any event, the Robinson-Patman Act did not propose or presume to settle this broad economic issue; and certainly the esteemed legislators, whose name the Act bears, would never have sponsored it if they deemed it a death sentence to their local industries.

The Robinson-Patman Act, at the time of its passage, was popularly and colloquially called the "chain store act" and while it has been interpreted by the courts to prohibit price differentials predicated upon the forceable collection of phantom freight, the Act in no way suggests the impropriety of uniform prices to the customers which are achieved by different freight absorption.

As pointed out in the brief for the National Lead Company and the other respondents, the Supreme Court stated in the case of *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

476 In the *Cement* case, the court summarized the situation very aptly:

> "Furthermore, the basing point price system has been in use by industry for almost a half century. There has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad. Numerous bills have been introduced in Congress seeking to outlaw its use. Countless time has been spent in hearings by Congressional committees, before whom it has been assailed and defended. The pages of the Congressional Record bear mute but indisputable proof of the fact that Congress has repeatedly refused to declare its use illegal. There is no occasion to relate this Congressional history. It is a matter of common and general knowledge. In the Corn Products case, the court in

commenting upon some of this legislative history stated (324 U. S. at page 737, 65 S. Ct. at page 967, 89 L. Ed. 1320): 'We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.' Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal per se, and to require that cement be sold on an f.o.b. plant basis. * * *

"In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain."

Apart from the discussion of Congressional intent by the courts it seems clear to us that the word "price" as used in the Act comprehends a delivered price. Otherwise the first "provided" clause of Section 2 (a) would not make sense.

"Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or Delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

The cost of delivery is clearly treated as a component "price" and hence the "price" must be a delivered
477 price. The provision clearly permits selling at differential delivered prices where differentials in cost of delivery justify. But the seller is no more required to sell at differential delivered prices than he is to give quantity discounts. Each is permissive only if justified. Just how it can be argued that the Act requires f.o.b. selling, when the opposite is indicated in so many words, passes all understanding.

VIII. Conclusion.

Since the filing of this Amended Complaint the Cement case has been decided by the Court of Appeals and there can be no argument at present that in view of this authoritative decision, as well as the dicta of the Corn Products and Staley cases, Section 2 (a) of the Clayton Act does not prohibit delivered price selling. The Complaint should be dismissed as a matter of law, permanently unless the

Cement decision is reversed. The record in this case, despite its volume is but a mere shell which contains no substance which substantiates the allegations of the Complaint, much less carries a plaintiff's proper burden of proof. The strange charge that these respondents have condoned National's monopoly provides a case of first impression which fails in all respects because no method of unfair competition by these respondents can be inferred from the evidence and because these respondents are not responsible legally for National's alleged monopolistic intent or conduct.

The Commission has failed to observe due process of law in respect to its Clayton Act case because the Commission has not frankly, fully, and fairly advised the respondents of the charges to be met specifically by them. The attempt to prove substantial restraint of trade in the sale of lead oxides to battery manufacturers falls short of the requirements of the statute. The Commission's whole theory of construction of the Robinson-Patman Act is reduced to absurdity by the testimony of the paint manufacturers. No differentials in these respondents' prices have been proven illegal price discriminations.

478 It is respectfully submitted that the Amended Complaint herein should be dismissed, because the evidence, as a matter of law, provides no grounds for a Cease and Desist Order.

Respectfully submitted,
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Of Counsel,
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Attorneys for Respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company.

479 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

MOTION TO DISMISS AMENDED COMPLAINT.

(Received Feb. 25, 1947.)

Comes now the respondent, The Sherwin-Williams Company, and by its counsel moves, upon the amended complaint herein and upon all proceedings heretofore had herein, that the Federal Trade Commission enter an order dismissing the amended complaint herein as to it upon the ground that there has been a failure of proof with respect to both Counts of the amended complaint.

Solely for the purposes of this motion to dismiss the amended complaint, and based solely upon the evidence adduced by the Commission, this respondent, in the interest of minimizing the burden on the Commission with respect to factual statements and briefs, is content to rely upon the factual statements and briefs filed by other respondents.

It should be noted, however, that, if the motions to dismiss are denied, the issues as finally drawn after the presentation of all evidence by this respondent may be substantially different from those now presented.

Respectfully submitted,

Davies, Richberg, Beebe, Busick
& Richardson,
(Illegible),

Of Counsel,

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Washington 5, D. C., and

T. J. McDowell,
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101 Prospect Avenue, N. W.,
Cleveland 1, Ohio,

Attorneys for Respondent,
The Sherwin-Williams
Company.

February 25, 1947.

481 BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 6th day of March, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

* * (Caption—5253) * *

ORDER DENYING MOTIONS TO DISMISS COMPLAINT.

This matter coming on to be heard by the Commission upon the motions of respondents Anaconda Copper Mining Company and International Smelting and Refining Company that the amended complaint herein be dismissed as to said respondents, and the Commission having considered said motions, the affidavits attached thereto, the memorandum of the attorney supporting the complaint in opposition to said motions, and the record herein, and the Commission being now fully advised in the premises;

482 And it appearing that respondent Anaconda Copper Mining Company, until recently, has been engaged, through its controlled or wholly owned subsidiaries, in the manufacture and sale of the products involved in this proceeding (lead pigments); that the discontinuance by respondent International Smelting and Refining Company of its lead pigment business did not occur until after the issuance and service of both the original and amended complaints herein and after much of the evidence in support of the complaint had been introduced; that said respondents are large smelters and refiners of pig lead, that lead pigments account for the consumption of much of the pig lead used in the United States, and that in view of the relationship between the pig lead and lead pigment businesses it is not unlikely that said re-

spondents may in the future see fit to re-enter the latter business;

And the Commission being of the opinion, in view of the above facts, that the withdrawal of said respondent from the lead pigment business does not afford sufficient basis for the dismissal of said respondents from this proceeding, and that considerations of public interest indicate that said respondents should be retained in the proceeding:

It Is Ordered that said motions be, and they hereby are, denied.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

514 BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of April, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

(Caption—5253)

ORDER DENYING MOTIONS TO DISMISS AMENDED COMPLAINT.

This matter coming on to be heard by the Commission upon the motions of respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, The Sherwin-Williams Company, and The Glidden Company that the amended complaint herein be dismissed, and upon the request of certain of said respondents for oral argument on said motions;

And it appearing that the briefs filed in support of and

in opposition to said motions are sufficient, together with the record herein, to enable the Commission to pass upon said motions without hearing oral argument thereon:

515 It Is Ordered that said request for oral argument be, and it hereby is, denied.

And the Commission having considered said motions, the briefs in support of and in opposition thereto, including reply brief of National Lead Company, and the record herein, and being now fully advised in the premises;

And the Commission being of the opinion that the evidence introduced in support of the amended complaint constitutes a prima facie showing of violations by the respondents of the statutes referred to in such complaint;

And it further appearing that the amended complaint charges the respondents with systematically discriminating in prices and is directed against the alleged system or method of discriminating in prices and in terms and conditions of sale of the respondents and not against individual instances of departure therefrom; and it further appearing that the attorney supporting the complaint has stated on the record that he does not intend to urge individual instances of discrimination which do not follow such system or method; and the Commission being of the opinion that any uncertainty or confusion which may heretofore have existed as to the theory and scope of the proceeding has been removed through such statement and through this order:

It It Ordered that said motions to dismiss the amended complaint herein be, and they hereby are, denied.

By the Commission.

(Seal) Otis B. Johnson,
Secretary.

586 BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND REASONS THEREFOR, OF RESPONDENT, NATIONAL LEAD COMPANY.

(Received Dec. 29, 1947.)

Alexander & Green,
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National Lead Company,
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James D. Ewing,
Eugene Z. DuBose,
Of Counsel.

December 29, 1947.

587 BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and submits the following proposed findings of fact, conclusions of law, and the reasons therefor:

Findings of Fact.

The Respondents.

1. (a) National Lead Company (hereinafter referred to as "National") is a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (answer of respondent National).

(b) The Eagle-Picher Company (hereinafter referred to as "Eagle-Picher") referred to in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation with its principal offices at The American Building, Cincinnati, Ohio. Eagle-Picher Sales Company, a

Delaware corporation having its principal offices at the same address, is a wholly-owned subsidiary of Eagle-Picher (answer of respondent Eagle-Picher).

(c) The Glidden Company (hereinafter referred to as "Glidden") is an Ohio corporation having its principal offices at Union Commerce Building, Cleveland, Ohio (answer of respondent Glidden).

(d) The Sherwin-Williams Company (hereinafter referred to as "Sherwin-Williams") is an Ohio corporation having its principal offices at 101 Prospect Avenue, N. W., Cleveland, Ohio (answer of respondent Sherwin-Williams).

588 (e) International Smelting & Refining Company (hereinafter referred to as "I. S. & R."), a Montana corporation with its principal offices at 25 Broadway, New York, N. Y., is a wholly-owned subsidiary of Anaconda Copper Mining Company (hereinafter referred to as "Anaconda"), a Montana corporation having its principal offices at the same address (answers of respondent Anaconda and I. S. & R.).

The Products Involved in This Proceeding.

2. (a) The term "Lead Pigments", as defined in the amended complaint, includes the following:

(1) "White lead", both basic carbonate and basic sulphate of lead;

(2) "Blue lead";

(3) "Red lead" (also known as an "oxide" of lead);

(4) "Litharge" (also known as an "oxide" of lead);

(5) "Orange mineral";

(6) "Grinders' lead paste".

Such products have been sold by some of the respondents in either dry form or in oil in the form of paste when mixed with linseed or other oils (Paragraph Four, Amended Complaint).

(b) "Pig lead" is derived from smelting and refining lead ore and lead concentrates which are the forms in which lead is produced by the mines. Lead ore and lead concentrates are mined at various points in the United States and other countries, notably Mexico, and the more important mines in the United States are located in the

Rocky Mountain States and in the so-called "Tri-State area" formed by the intersection of the boundaries of Missouri, Oklahoma and Kansas. The lead ore and concentrates so mined are shipped to smelters and refineries where the impurities are removed to form common desilverized pig lead and corroding pig lead. Common desilverized pig lead and corroding pig lead are sold by the smelters and refineries to various manufacturers of lead products, including lead pigments, oxides, cables, ammuni-
589 tion, extruded and rolled lead products, and various alloys and other products (2123-24, 2125-27, 2129 40, 4091).

3. The lead pigments, including oxides, so manufactured from pig lead are sold by some or all of respondents herein and other companies to various types of purchasers, including the paint trade, paint manufacturers, industrial concerns for their own consumption, battery manufacturers, ceramic and pottery manufacturers and the oil and gasoline industry (1070, 1073, 1566, 1599, 1628-32, 2547, 2765, 3073).

4. (a) Basic carbonate of white lead has been made from corroding pig lead by various methods, including the Dutch, Lennox, Carter and electrolytic process. The process is slow and involves many steps. Although most basic carbonate of white lead differs only slightly chemically, the physical characteristics of the material as made by the various methods or by different manufacturers vary considerably, particularly with relation to size of particle, whiteness, hiding power, ease of application or the particular use to which the purchaser may wish to put the product (1660, 2882; Resp. Ex. 156; 1073, 2903-05, 3615-16).

(b) Red lead and litharge are made by roasting pig lead in ovens or furnaces. Litharge is the result of the first step of roasting and red lead is made by further roasting (2943-44). Red lead is made in grades of 95%, 97% and 98% red lead. 98% red lead is the highest quality red lead and can be made in 48 hours (3872). The red lead and litharge manufactured by some of the respondents and other companies are not identical products but vary according to the particular method of manufacture and the use to which the purchaser may wish to put the particular product (1736-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22).

5. (a) Dry white lead, basic carbonate, has been sold by the respondents to paint grinders or manufacturers

for use as one of the ingredients in the manufacture of ready-mixed paints (1070, 2999). While formerly basic carbonate of lead was used as one of the principal
590 ingredients in some of the best paints, beginning with 1930 and in subsequent years, basic carbonate of lead in dry form has been used in smaller quantities and in place thereof paint manufacturers have used basic sulphate of lead, lithopone, leaded zinc oxide, titanium dioxide, or a combination of two or more such products with basic carbonate of lead (1408-09, 1424, 1661, 2583, 2998-99, 3337, 3340-42, 3346, 3354-55).

(b) Dry white lead, basic sulphate, has also been sold by some of the respondents to paint manufacturers for the same use either alone or as combined with zinc oxide to form leaded zinc oxide (3349, 3354-55).

(c) White lead in oil is basic carbonate of white lead mixed with linseed oil to form a paste (Resp. Ex. 156; 2879-80, 2889) and this has been sold by the respondents either through agents to dealers, painters, industrial consumers, governmental agencies and individual householders or directly to distributors and the same classes of customers (Answers of respondents). White lead in oil has been used, when mixed with other oils and thinners, as an exterior house paint of high quality (2887-88). The mixing of white lead in oil with the other ingredients necessary to render it ready for application requires some skill on the part of the consumer (2286). During the last fifteen or twenty years the sales of white lead in oil have steadily declined as the result of the competition furnished by ready-mixed paints which offer the consumer a paint ready for application (Resp. Ex. 140; Com. Ex. 851-A; 3617-18, 3662-63, 3672). During the past decade at least one of the respondents has sold a ready-mixed pure white lead paint ready for use by the painter or other consumer (3662-63, 3665). White lead in oil has also been sold in the form of grinders' paste to manufacturers of paint products (3985).

(d) Red lead in the form of red lead in oil is used as one of the principal ingredients in red lead paint and has been sold to railroads, steamships, industrial accounts and to the paint trade (3000; Com. Ex. 615A-D). Dry red lead is also used in the manufacture of electric storage battery plates and by the paint and varnish trade (2999).

591 (e) Litharge is used in the manufacture of electric storage battery plates and to some extent by the paint trade, pottery business and the oil and gasoline industry (2547, 2765, 3000, 3073).

(f) Blue lead and orange mineral are insignificant items of commerce.

The Business of Respondents.

6. During the period from 1936 to 1941, respondent, National, produced approximately 60% of the white lead in oil sold on the market, from 30% to 35% of the dry white lead, basic carbonate, sold on the market and approximately 50% of the oxides, red lead and litharge, sold on the market (1647, 1665-66; Com. Ex. 664). The combined total percentage of dry white lead, basic carbonate, and white lead in oil sold on the market for this respondent was 58.8% in 1938 and 53% in 1941 (Com. Ex. 669). In addition, respondent, National, sold small quantities of basic sulphate of lead but it has never been a significant factor in the industry with respect to this product (3349). Respondent, National, manufactures basic carbonate of white lead at plants located at Perth Amboy, New Jersey, Philadelphia, Chicago, St. Louis and Oakland, California (1071-72). Its oxide plants are located in Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles and San Francisco (1625). The Dallas plant was put into operation in 1940 or 1941 and the Atlanta plant in 1942 (1625). While, prior to 1921, respondent, National, secured the bulk of its pig lead requirements from American Smelting and Refining Company (Comm. Ex. 93A-I), in more recent years it has purchased pig lead from a number of smelters and refineries, including St. Joseph Lead Co., U. S. Smelting & Refining Co., American Smelting and Refining Company, Anaconda Sales Co., and others (1068; Resp. Ex. 173).

7. During the period from 1930 to 1946, respondent, Eagle-Picher, produced from 15% to 20% of the white lead in oil sold on the market and approximately 10% of the dry white lead, basic carbonate, sold in the United States (1560-61). In addition, this respondent pro-
592 duced and sold substantial quantities of basic sulphate of lead either as such or as mixed with zinc oxide to form leaded zinc oxide (3357, 4129). During the period from 1937 to 1944, respondent, Eagle-Picher, pro-

duced and sold the following quantities of dry white lead, basic carbonate, and basic sulphate of lead (4129):

Year	Sales Tonnages. Basic White Lead Carbonate	Basic White Lead Sulphate
1937	4,533	7,348
1938	3,356	5,955
1939	3,246	5,315
1940	2,769	4,986
1941	5,163	8,066
1942	3,116	5,820
1943	3,113	3,889
1944	3,666	4,342

In addition, respondent Eagle-Picher's production of leaded zinc oxide (basic sulphate of lead combined with zinc oxide (3356)) during 1941-1942 was approximately three and one-half times its production of basic white lead sulphate (3357). Respondent, Eagle-Picher, produced white lead at its plant in Cincinnati, Ohio, and its oxides, red lead and litharge, at plants located in Joplin, Missouri, and Newark, New Jersey (1552, 1564). In addition, it manufactured basic white lead sulphate and leaded zinc oxide at its Galena, Kansas plant (3421). It also manufactures leaded zinc oxide at Hillsboro, Illinois (3600). The bulk of its pig lead is purchased from U. S. Smelting & Refining Co., East Chicago, Indiana, although respondent, Eagle-Picher, produces a high grade ore itself in the Tri-State area from which it manufactures basic sulphate of lead and zinc oxide (1561-62, 3437).

Prior to World War II and in 1945 and 1946, respondent, Eagle-Picher, produced and sold a ready-mixed pure white lead paint known as R. T. U. (3662-63, 3665).

8. From 1932 to 1943, respondent Glidden produced between 2% and 9% of the white lead in oil sold in this
593 country (Resp. Ex. 144), between 8% and 18% of the dry white lead, basic carbonate, sales (Resp. Ex. 145), and between approximately 4% and 8% of the oxides, red lead and litharge, sold in the industry (Resp. Ex. 146). Respondent, Glidden, has two divisions, Euston Lead Co., Scranton, Pennsylvania, acquired in 1924, which produces basic carbonate of lead, and Metals Refining Co., Hammond, Indiana, acquired in 1929, which produces red lead and litharge (1230, 1231, 1233, 2455, 2732). Respondent,

Glidden, is also a large manufacturer of ready-mixed paints (2553, 2661).

9. While respondent, Sherwin-Williams, produces white lead and oxides, red lead and litharge, at its plant in Chicago (1313), it does not sell oxides to battery manufacturers (1648). In 1944 and for many years prior thereto, respondent, Sherwin-Williams, sold about 5% of the white lead in oil and less than 1% of the dry white lead, litharge, and red lead sold in this country (1331-1332). Respondent, Sherwin-Williams, also manufactures ready-mixed paints.

10. Respondent, Anaconda, has never engaged in the business of the manufacture or sale of lead pigments. Neither respondent, Anaconda, nor any of its subsidiaries has ever produced any oxides, red lead or litharge. In 1919, Anaconda Lead Products Co., a subsidiary of respondent, Anaconda, began the production of dry white lead, basic carbonate, at its plant in East Chicago, Indiana, and the production of white lead in oil at the same plant in 1931. In 1936, respondent, I. S. & R., acquired the property and assets of Anaconda Lead Products Co. The principal source of pig lead for this respondent was lead bullion smelted in Utah and refined in East Chicago, Indiana (Com. Ex. 836A-N). From 1937 to 1941, respondent, I. S. & R., sold from 3% to 4% of the white lead in oil sold in this country and from 10% to 19% of the dry white lead, basic carbonate (Com. Exs. 741, 836-J). Its combined percentage of the white lead in oil and dry white lead, basic carbonate, sales was 6.6% in 1938 and 8.8% in 1941 (Com. Ex. 669).

594 In July, 1946, respondent I. S. & R. discontinued the production and sale of white lead in oil and dry white lead, basic carbonate (Com. Ex. 836-B), and on October 1, 1946, it sold the plant in East Chicago, Indiana, where these materials had been manufactured, to respondent Eagle-Picher (2035) after having received a number of bids from other companies, not respondents in this proceeding (3545).

11. Basic carbonate of white lead has been produced by companies other than respondents, including MacGregor and W. P. Fuller & Son (Com. Ex. 669); white lead in oil has been produced by many manufacturers of ready-mixed paints (2525); while oxides, red lead and litharge, have been produced by Hammond Lead Co., Hammond, Indiana

(1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022), and by storage battery manufacturers for their own consumption (1647).

Respondent, National Lead Company.

12. On or about December 8, 1891, respondent, National, was formed by the acquisition of properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

595 1195 shares Cornell Lead Co.
9993 shares The National Lead & Oil Co. of N. Y.
495 shares Atlantic White Lead & Linseed Oil Co.
670 shares Salem Lead Co.
1995 shares The J. H. Morley Lead Co.
6495 shares The Eckstein White Lead Co.
531 shares Anchor White Lead Co.
295 shares Maryland White Lead Co.
950 shares American White Lead Co.
267 shares Kentucky Lead & Oil Co.
9995 shares Southern White Lead Co. of Illinois.
2995 shares D. B. Shipman White Lead Works
9993 shares Southern White Lead Co. of Missouri.
2995 shares St. Louis Lead & Oil Co.
993 shares Collier White Lead & Oil Co.
495 shares Red Seal Castor Oil Co.,

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and

kindred products, the stock ownership of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.) This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company (17-19).

596 13. From the date of its organization, it was the expressed intention of respondent, National, not to become a monopoly in any line of commerce nor to engage in any monopolistic activities (Resp. Ex. 179-E).

14. Early in its history, respondent, National, closed many of the plants manufacturing lead products, amalgamated others and enlarged existing plants, all of which was intended to and did promote more efficient and economical methods of manufacture and lower prices to the purchasing public (Resp. Exs. 175-A, 179-D).

15. Eventually respondent, National, established branch offices at the following points: New York, Philadelphia, Boston, Buffalo, Pittsburgh, Cincinnati, Cleveland, Chicago, St. Louis and San Francisco (Resp. Ex. 153). The territories served by these branches were in most instances the territories which theretofore had been served by the predecessor companies prior to acquisition by respondent, National (2891-92).

16. In the summer of 1930, officials of respondent, National, were approached by A. & J. Frank, brokers in Cincinnati, who called attention to the fact that shares of common stock of respondent, Eagle-Picher (then known as "Eagle-Picher Lead Company") were being offered for sale at low prices (3308, 3311). In accordance with its policy of occasionally making short-term investments in the stocks of other industrial companies, and taking into consideration the low price (3305), respondent, National, beginning on July 29, 1930 and continuing from time to time through June 13, 1932, bought for investment 44,900 shares of common stock of respondent, Eagle-Picher, at a total purchase price of $226,630 (Resp. Ex. 183). These shares were purchased in the name of respondent National's nominee, E. J. Cornish, who was then its president (3308, 4121). At that time there were issued and outstanding approximately 900,000 shares of common stock of respondent, Eagle-Picher (4122-23). The bulk of the shares of stock of respondent, Eagle-Picher, so purchased by respondent, National, was sold by it in the early part of 1937 and by March 5, 1937, respondent, National, held only 3,500 shares of common stock of respondent, Eagle-Picher (Resp. Ex. 183). These were subsequently transferred to the name of respondent, National, and were sold in June, 1944 (Com. Ex. 700-B, Resp. Ex. 183). The total sales price received by respondent, National, in the sale of the 44,900 shares of common stock of respondent, Eagle-Picher, was $1,086,014.03 (Resp. Ex. 183), so that respondent, National, made a profit on this investment of $859,384.03. In addition, on April 13, 1932 respondent, National, purchased 50 shares of preferred stock of respondent, Eagle-Picher, for $2,600 which it sold on February 27, 1937 for $5,197.50 (Resp. Ex. 183). At no time was respondent, National, represented on the Board of Directors of respondent, Eagle-Picher, and respondent, National, voted the stock of the respondent, Eagle-Picher, by proxy. Respondent, National, made no attempt at any time to exercise any sort of control over respondent, Eagle-Picher, and made no attempt at any time to influence respondent, Eagle-Picher, in the conduct or management of its business (3308-09). Following a suggestion made the early part of 1931 by one Frederick Hertenstein, a vice-president and director of respondent, Eagle-Picher, that E. J. Cornish,

president of respondent, National, consider the purchase of a large block of stock of respondent, Eagle-Picher, respondent, National, on or about May 12, 1931 sent Hertenstein a letter, addressed to the President and Directors of respondent, Eagle-Picher, containing a proposal that respondent, National, purchase the assets and goodwill of respondent, Eagle-Picher, with the request that Hertenstein present it in proper form to the company. Hertenstein never delivered this letter as requested. He expressed the opinion that the offer was unsatisfactory, and returned the letter to respondent, National, without presenting it to the Board of Directors of respondent, Eagle-Picher, and nothing further came of the proposed transaction. The Department of Justice was kept informed as to all the negotiations in connection with this proposal and was asked to express its opinion as to the legality of the proposed transaction. The Department of Justice on or about May 8, 1931 stated that it preferred to express no opinion as to the legality of the transaction. A copy of the letter sent to Hertenstein was forwarded to the Department of Justice (Com. Ex. 866A-B; 4182-83).

598 17. Prior to January, 1942 when the Office of Price Administration was established, the cost to respondent, National, of its inventories of corroding pig lead and of the lead content of basic carbonate of lead in process and in finished stock was the most important single factor in its determination of its selling price of basic carbonate of white lead, both dry and in oil (Par. 6, answer of respondent, National; Resp. Ex. 154A-I). In addition, with respect to dry white lead, basic carbonate, the price at which respondent, National, sold this product also depended upon the price of competitive pigments such as basic sulphate of lead, leaded zinc oxide and titanium dioxide. In setting a price for white lead in oil, respondent, National, also took into consideration the prices at which competitive ready-mixed paints were being sold (2998-99). The price at which respondent, National, sold red lead and litharge depended upon the day to day market price for pig lead from which such oxides were made and to the price of pig lead was added a charge to cover the process of conversion from pig lead to litharge or red lead, as the case might be (1635-36).

18. Respondent, National, has never at any time exerted any influence upon American Smelting and Refining Com-

pany or any other producer of pig lead with respect to the determination of the price at which such producers would sell pig lead on the market (1220-21, 3278, 4087). It was to the interest of respondent, National, to obtain pig lead at the lowest possible price to it, while it was to the interest of American Smelting and Refining Company and the miners from whom that company purchased lead ore or lead concentrates to obtain the highest possible price for its pig lead (4087, 4088*). In so doing, American Smelting and Refining Company, the largest producer of pig lead in the world (4091), attempted to sell on the market pig lead in the same quantities and upon the same price basis as it was then purchasing the raw material, lead ore or lead concentrates, from the miners (4088, 4088*). American Smelting and Refining Company determined the price at which it sold pig lead and from time to time quoted prices f. o. b. New York, which was one of the chief markets for such product (1220, 2386, 4088).

599 In 1906 respondent, National, entered into a contract with American Smelting and Refining Company requiring respondent, National, for a period of fifteen years to purchase the bulk of its pig lead requirements from American Smelting and Refining Company (Com. Ex. 93A-I). This contract expired in 1921 and, although American Smelting and Refining Company attempted to obtain an extension thereof, respondent, National, refused to give one on the ground that such a contract was too onerous a burden upon it (4083-84). Thereupon, respondent, National, and American Smelting and Refining Company signed a mutual release with respect to the obligations created by said 1906 contract (4085; Resp. Ex. 228) and from 1921 on respondent, National, purchased pig lead from American Smelting and Refining Company and other producers of pig lead on a month to month basis at a spot price or at an average monthly price (3279-80, 4085-86). From 1936 to 1941, respondent, National, made purchases of pig lead as follows (Resp. Ex. 173):

* There are two pages of the Transcript marked 4088. The reference is to the second of such pages marked 4088.

Pig Lead Purchases.
(Tons)

	1936	1937	1938	1939	1940	1941
A. S. & R. Company**	48,472	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine La Motte)	—	—	—	—	—	871
Bunker Hill Smelter	—	—	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro de Pasco	—	—	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	*80,005
Totals	121,822	129,831	97,020	122,204	133,195	211,395

* Anaconda Sales Co. 5,000
U. S. Smelting 2,000
American Metal Co. 8,000
C. Tennant Sons & Co. 45,005

** American Smelting & Refining Company.

600 19. During its entire history, respondent, National, has never attempted to obtain, nor has it obtained, a monopoly of or monopoly power or control over the manufacture, pricing, sale or distribution of lead pigments in commerce or any of them (See Reasons for Proposed Findings).

Lead Industries Association and the N. R. A. Period.

20. Respondents (with the exception of respondents, Anaconda and I. S. & R.) and more than forty other companies have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent I. S. & R., became a member in 1929 (Com. Exs. 498A-K, 499A-H).

21. Lead Industries Association was formed in November, 1928 to foster scientific research and promotional work for the lead industry and to disseminate pertinent information concerning lead products and to act as representative of the lead industry before the public (Resp. Ex. 1). From its inception, its membership has included practically all of the mining companies, smelters, refiners and manufacturers of lead products (2131-48; Resp. Exs. 15A-B) of which the miners, smelters and refiners have constituted the dominant group (2536).

22. Article 3 of the constitution of Lead Industries Association reads as follows (Resp. Ex. 1):

"Article 3.

Limitations.

No agreement, understanding, combination or arrangement or any form of concerted action to curtail production, fix prices, suppress competition, or in any other manner to restrain trade or commerce, or to monopolize, or attempt to monopolize any part of the trade or commerce of the country shall be permitted in the Lead Industries Association, nor any other act or acts which may be in contravention of law or good business practice. Each member of the association shall be wholly free to conduct its business without legal or moral accountability to the association or to any member thereof."

601 23. Shortly after the formation of Lead Industries Association, its Secretary, Felix E. Wormser, was requested to furnish and did furnish the Department of Justice with the details of the Association's organization and proposed activity (Resp. Exs. 14, 15A-B, 16, 17, 18, 19, 20, 21, 22, 23), and from the time of its organization the Department of Justice and the Federal Trade Commission, as well as other public agencies, were furnished with copies of the statistical reports issued by the Lead Industries Association to its members (2188-89).

24. Since its organization, Lead Industries Association has received from respondents (other than respondent Anaconda) and other manufacturers of lead pigments monthly reports showing individual statistics as to production, shipment, and stock on hand and in turn each month Lead Industries Association has furnished its members with reports of the total of such figures for the entire industry (2186-87; Com. Ex. 670). No individual report by any member has ever been furnished to any other member (2186-87) and at no time has Lead Industries Association ever received from its members or disseminated to such members any price data, whether as to past or future transactions (2187-88). Lead Industries Association did not issue any publication to the trade setting forth current market quotations on lead pigments (1039) and it did not furnish

information or quotations on lead pigments to any trade publication (1040).

25. Lead Industries Association has done notable work in connection with the subject of lead poisoning, both as to research and public education (2537), and from time to time has engaged in promotional campaigns designed to increase the production of and to widen the market for lead pigments and other lead products (Resp. Exs. 31C, 50B-D, 52G, 59C; 2296, 2298, 2372). In addition, Lead Industries Association has represented the lead industry before various scientific and medical associations and has appeared for the lead industry before various legislative bodies (2537).

26. In 1933, after the enactment of the National Industrial Recovery Act, the members of Lead Association 602 expressed reluctance to the formulation of any Code for the lead industry, but at the urgent insistence of N. R. A. officials the Lead Industries Association in July, 1933 drafted a so-called "Master Code" which dealt primarily with wages and hours and had no provisions with respect to trade practices (Resp. Exs. 50K, L, O; 2153-54; Resp. Ex. 77A-F; 2308). This was presented for approval to officials of the N. R. A., but these officials insisted that the Code for the lead industry include schedules for trade practices and price reporting (Resp. Exs. 81A-B; 2170; Com. Ex. 518A, 2397-98). Complying with this insistence, the members of the lead industry attempted to draft supplementary codes for the lead pigment manufacturers containing such provisions (Resp. Ex. 50K-L). The manufacturers of lead pigments constituted the Lead Pigments Division for Code purposes and in connection with the drafting of schedules of trade practices, two committees were appointed, one, the White Lead in Oil Committee, and the other, the Dry Products Committee (Com. Exs. 501-A-D, 508C, 800A-C). The Dry Products Committee, in turn, was subdivided into two groups, one representing the manufacturers of dry white lead and the other, producers of oxides (2175). Respondents, with the exception of respondent, Anaconda, and other companies not respondents in this proceeding, were represented on both committees.

27. The White Lead in Oil Committee and the Dry Products Committee met on various occasions between July, 1933 and January, 1934 in an attempt to draft supplementary codes acceptable to the N. R. A. (Com. Exs.

501A-D, 502A-C, 504A-B, 505A-B, 799, 800A-C, 801A-B, 802A-B, 803, 805A-C; Resp. Exs. 83A-Z-3, 85AZ-13, 134A-E, 135A-B, 136A-B, 137A-B, 138A-B). Many topics were discussed at those meetings, including terms and conditions of sale, the agency method of selling and freight and zoning problems (id.). Various proposed supplementary codes were drafted and submitted to the N. R. A. which, in turn, made many suggestions as to the final wording (id.; Resp. Ex. 159D). One of the suggestions of Deputy Administrator Janssen concerned the filing of prices and terms of sale with the Code Authority and the provision suggested 603 would have had the effect of requiring rigid adherence to announced prices and terms of sale (Com. Ex. 518A-B). The Lead Pigments Division, while reluctant to the adoption of any price filing provision (Resp. Ex. 50-O), rejected the suggested provision and, instead, substituted a provision which merely required the filing of prices and deviations from the terms of sale for oxides and dry white lead, basic carbonate, set forth in Schedule A of the Lead Code (Com. Ex. 803). No agreement or understanding was reached by or among any of the respondents as to the use of the agency method of selling or zones (Com. Exs. 506E, 505A). Schedule A of the Lead Code (Com. Ex. 809), setting forth the terms of sale for oxides and dry white lead, contained no reference to prices because the respondents and other manufacturers of lead pigments did not wish to contravene the anti-trust statutes even for Code purposes (Com. Ex. 504B).

28. The Code for the Lead Industry was approved on May 24, 1934 (Com. Ex. 809) and shortly thereafter the respondents and other manufacturers of lead pigments, being unwilling to report prices or to be required to follow the terms of sale of Schedule A, requested and obtained a temporary exemption from Section 2 of Article VII of the Lead Code dealing with the filing of prices and deviations from the terms of sale set forth in Schedule A as well as from the requirements of Schedule A (Resp. Exs. 6A-I, 7A-C, 8A-B). A further exemption was requested in September, 1934 (Com. Ex. 507A-C, Resp. Ex. 9A-F) and neither Section 2 of Article VII of the Lead Code nor Schedule A ever became enforceable or effective under the terms of the Lead Code (Resp. Ex. 9E-F; 2228-30).

29. From June, 1934 until the N. R. A. was declared unconstitutional, the Lead Code was administered by a Code

Authority composed of the Executive Committee of Lead Industries Association and the chairmen of the various divisions of the Association (Resp. Exs. 127A-G, 13A-D).

30. In the fall of 1933 (Com. Exs. 705A-D, 706A-D) and again in November, 1934, the paint industry attempted
604 to persuade the N. R. A. that the manufacturers of white lead should be subject to the provisions of the Paint Code but some of the respondents and the Code Authority for the Lead Code successfully resisted both attempts (Resp. Ex. 11A-F; 2238-39). Some of the respondents and other manufacturers of white lead felt that if lead pigments were brought under the Paint Code, the prices for white lead would be raised to the detriment of the public and their own competitive position with respect to the paint industry (id.). This feeling was based upon the fact that the Paint Code (Resp. Ex. 12) contained a provision prohibiting sales below cost and cost was defined in such an arbitrary fashion as to make it inevitable that white lead prices would be greatly increased over their customary level (2239-45).

31. On June 11, 1935, shortly after the N. R. A. was declared unconstitutional, the Code Authority met informally and wound up its affairs (Resp. Ex. 13A-D).

32. In November, 1935, George L. Berry, Esq., Coordinator for Industrial Cooperation, invited representatives from Lead Industries Association to Washington to consider voluntary action to continue the activities of the N. R. A., and the Executive Committee of Lead Industries Association, at a meeting held on November 22, 1935, resolved as follows (Resp. Ex. 92A-B):

> "Whereas, the Lead Industries Association was invited, under date of October 9, 1935, to attend a conference in Washington, called by Mr. George L. Berry, Coordinator for Industrial Cooperation, 'for the purpose of conferring upon the advisability of developing a permanent structure contemplating the furtherance of prosperity and stability in our industrial life', and 'for consideration of the best means of accelerating industrial recovery, eliminating unemployment and maintaining business and labor standards'; and
>
> Whereas, the Lead Industries Association in reply declared itself as opposed to the aforesaid governmental conference at this time as tending to confuse and disturb industry, although indicating a willingness to send a representative if desired; and

Whereas, Mr. Berry's letter of November 7, 1935, giving details of the conference, undisclosed by the invitation of October 9, from which it appears that the meeting will be so conducted that representatives of the Lead Industries Association might be held to have committed the industry and its members to a program adopted at the conference because of participation in it; and

Whereas, majority action upon matters placed before the conference might by implication bind an unwilling minority; and

Whereas, the Lead Industries Association basically represents a natural resource industry, producing diversified lead products from mine to finished material, with mining and smelting operations generally conducted in remote localities under operating conditions dissimilar to those usually found in other industries, and with problems peculiarly its own; and

Whereas, the lead industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of N. R. A. than it did before;

Now, Therefore, Be It Resolved, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935."

33. During the course of N. R. A., respondent, National, through its president, E. J. Cornish, expressed its policy to the effect that N. R. A. was only temporary and should not be made the cloak for price-fixing activities (Resp. Ex. 168, 3067) and on June 6, 1935, the Executive Committee of respondent, National, resolved that the termination of N. R. A. did not require any change in company practices theretofore followed (Resp. Ex. 182).

The Agency Method.

34. In December, 1932, the Atlantic Branch (in New York) of respondent, National, first began to employ the agency method of selling white lead in oil in an attempt to forestall the wide-spread practice of certain dealers who were using Dutch Boy white lead in oil produced
606 by respondent, National, as a "loss leader" to attract the retail trade by selling the product at retail at cost or very little above cost (2905-07).

35. The agency method of selling white lead in oil was to enter into written contracts with reliable dealers (Com. Ex. 595) who, under the terms of the contract, were to act as the manufacturer's agent in selling the product, title to which remained in the manufacturer (Com. Ex. 613A-C). Under the terms of the agency contract, the agent agreed to sell the product at a stated price and he was to be compensated for his services by receiving the difference between a stated amount (sometimes called the "agent's price" [Com. Ex. 656A-B]) and the price at which he sold the product to purchasers in the retail market. Sales were periodically reported by the agent to the manufacturer who thereafter billed the agent for the goods sold by him upon the basis of the commission differential just described (638; Com. Ex. 752A-Z-144).

36. The agency method as originally employed by the Atlantic Branch of respondent, National, and as later extended, was based upon a similar method that had been used by the General Electric Company in its sale of Mazda lamps (Com. Ex. 506-D). The agency, however, was not exclusive and the agent was free to handle the goods of manufacturers other than respondent, National (Com. Ex. 706B-D).

37. Following the inauguration of the agency plan by the Atlantic Branch of respondent, National, in the early part of 1933, respondent, National, extended the use of the plan to its eastern territories (Com. Ex. 712A).

38. About the same time, respondent, Eagle-Picher, also experimented with the use of the agency method of selling white lead in oil (Com. Ex. 712A) and during the summer of 1933 respondent, Eagle-Picher, was informed by respondent, National, that the latter's agents for the most part were in favor of the continuation of the agency method (Com. Exs. 684, 686).

607 39. When in October, 1933, it became apparent that the initial attempt of the paint industry, which was opposed to the use of the agency method, to have the white lead industry brought under the Paint Code would not be successful, respondent, National, thereupon determined to extend the use of the agency method of selling white lead in oil to all of its branches, with the exception of the Pacific Coast and the method was so extended in November, 1933 (Com. Exs. 596A-B, 597, 598).

40. At the time respondent, National, determined to

extend the use of the agency method on a nation-wide basis, it so informed respondent, Eagle-Picher (Com. Ex. 599) and the latter also extended the method on a nation-wide basis at or about the same time (Com. Ex. 629 A-C).

41. There was no agreement at any time between respondent, National, and respondent, Eagle-Picher, or any other respondent as to the use of the agency method nor was participation by the other respondents in the use of the plan invited or suggested at any time by respondent, National, which determined to employ the agency plan regardless of the action of any other manufacturer of white lead in oil (See Reasons for Findings).

42. Although the agency method was discussed when supplementary codes were being drafted by the Lead Pigments Division during N. R. A. days, no agreement as to the inclusion of this plan in the Code could be reached since some of the manufacturers of white lead in oil, notably, respondent, Sherwin-Williams, and respondent, Glidden, were opposed to the plan because of its consignment feature (Com. Ex. 506-E).

43. Admittedly, consignment of goods under the agency method was an economic evil from the manufacturer's standpoint since it resulted in tying up inventories scattered throughout the territories in which agents were located (2909), but in the view of respondent, National, this dis-
608 advantage was more than outweighed by the advantage of eradicating the demoralizing situation created by the retailers' practice of selling white lead in oil as a "loss leader" (2907).

44. Respondent, Glidden, employed the agency method for only a short time between 1939 and 1941 or 1942 (Com. Ex. 649A-C; 2522), but it sold no substantial percentage of white lead in oil by this method (Com. Ex. 772A-Z-31).

45. Respondent, Sherwin-Williams, never used the agency method.

46. Respondent, I. S. & R., did not employ the agency method but did use a so-called "consignment arrangement" for the sale of white lead in oil beginning in November, 1932 (Com. Ex. 836E).

47. In January, 1944, respondent, National, discontinued the use of the agency method and it has not employed that method since that time (Com. Ex. 624A-B; Resp. Ex. 158).

48. Since the discontinuance of the agency method, respondent, National, has sold white lead in oil to distributors

to whom resale prices have been suggested but not required (Resp. Ex. 158; 3939).

49. The agency method of selling was never used by any respondent in selling any lead pigments other than white lead in oil.

Zones.

A. White Lead in Oil.

50. Since at least as early as 1910, respondent, National has sold white lead in oil on the basis of zone or territorial differentials (2893). From 1910 up until the adoption of a zone map in the latter part of 1933, these territorial differentials were expressed in terms of delivery, differential and equalization points (2894; Com. Ex. 659C-P). Delivery points were those cities and towns in the par territory of the Northeastern and Midwestern States which repre-
609 sented the chief markets for white lead in oil where free delivery was made to the customer or distributor, i. e., where a flat price with no additional charge for freight was made, regardless of the location of the delivery point. Differential points were towns and cities located in other areas of the United States where a differential premium over the base price was charged to compensate in part for the greater freight charges incurred by respondent, National (Com. Ex. 659C-P). Differential points carrying the same, or nearly the same, differential premium would be included in the same territory so that in one group of States the differential points would carry a premium of $\frac{1}{8}$¢ per lb. over the base price, while other groups of States would contain respectively differential points carrying a premium of $\frac{1}{4}$¢, $\frac{3}{8}$¢, $\frac{1}{2}$¢, $\frac{5}{8}$¢, $\frac{7}{8}$¢, $\frac{3}{4}$¢ or 1¢ per lb. over the base price as the case might be (Resp. Ex. 147). Equalization points were towns located both in par and in differential territories with which freight would be equalized in case shipments of white lead in oil were made to points which were not either delivery or differential points. In other words, if a shipment were made to a customer located in a town other than a delivery or differential point, the customer would pay a freight charge in addition to the price, equivalent to the difference between the freight to destination and the freight to the equalization point, but the freight charge in no case would be greater than the applicable freight between the equalization point and the destination of the shipment (2948).

51. From time to time new delivery or differential points were added and changes were made in differential premiums (Com. Ex. 659C-P).

52. The possibility of setting up zones under the proposed supplemental code for the manufacturers of lead pigments was discussed at meetings of the White Lead in Oil Committee of the Lead Pigments Division during the latter part of 1933, but no agreement among respondents and the other manufacturers of white lead in oil could be reached, and therefore zones for white lead in oil were not included in the proposed supplemental code (Com. Exs. 501A-D, 505A-B).

610 53. During the course of the discussions in the White Lead in Oil Committee meetings, respondent, National, gathered various material to be presented to the White Lead in Oil Committee with respect to the zones for white lead in oil (Com. Ex. 513A-B).

54. When it became apparent that the members of the White Lead in Oil Committee could not agree on the use of zones as a part of the supplemental code for the manufacturers of lead pigments, respondent, National, determined itself to employ a zone map setting forth in a convenient form a modification of the territorial or zone differentials which had been employed by it at least as far back as 1910 (2916; Resp. Ex. 147).

55. Instead of using the old and cumbersome method of delivery, differential and equalization points, respondent, National, determined to set forth by territorial division flat differentials and to portray the zones pictorially upon a map (Com. Ex. 580). This was done shortly after the agency method was established on a nationwide basis by respondent, National, in November, 1933, and one of the reasons for the use of the zone map as such was to simplify the agency set up (2916).

56. When respondent, Eagle-Picher, learned that National had begun to use a zone map for the sale and distribution of white lead in oil, it also employed a similar method of distribution (1551). In addition, respondent, Glidden, and in 1936, respondent, I. S. & R., followed the practices established by National in connection with the use of the zone map (2508-09, 3512-13), with the exception that these respondents did not employ a zone map as such and apparently it was not until 1937 that respondent, I. S. & R., employed any zone map for the sale and distribution of

white lead in oil (Com. Ex. 836-E). Respondent, Glidden, on the other hand, has never used any zone map as such for the sale and distribution of white lead in oil (Com. Ex. 593; 1254, 1289, 1293, 2590).

611 57. There was no agreement between respondent, National, or any of the other respondents in this proceeding as to the use of a zone map for the sale and distribution of white lead in oil, nor was participation in the use of such a map invited or suggested at any time by respondent, National, to any of the other respondents in this proceeding (2561-62, 2916, 3539, 3662).

B. Dry White Lead, Basic Carbonate.

58. For some time prior to 1933, dry white lead, basic carbonate, sold at a higher price of ¼¢ per pound in the Pacific Coast area and in the other States west of the Rocky Mountains, 2625).

59. In June, 1934, respondent, National, made a slight change and included in the Pacific Coast area the States of New Mexico, Colorado, Wyoming and Montana, so that from that time on respondent, National, charged a differential of ¼¢ a pound higher for sales of dry white lead, basic carbonate, in States west of the line formed by the eastern boundary of the States just mentioned than it did throughout the rest of the country where a flat price was charged (Resp. Ex. 159A).

60. Some of the other respondents made sales of dry white lead, basic carbonate, in the far western States and when on occasion they did some of them followed the competitive price established for those States (1576, 2624, 3497-98).

61. There was no agreement at any time between respondent, National, or any other respondent in this proceeding as to the establishment of a differential price for dry white lead, basic carbonate, in the far western States, nor was participation in the employment of this method of sale invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2921, 2996, 3508, 3662).

C. Oxides, Red Lead and Litharge.

62. In December, 1933, there was some discussion among respondents (respondents Anaconda and I. S. & R.
612 were not parties to this discussion and neither company has ever manufactured or sold red lead or litharge) and other manufacturers of red lead and litharge as to the possibility of including in the supplementary code for oxides (red lead and litharge) differential zones for the southern and western States, but no agreement among respondents or the other manufacturers of oxides was made (Resp. Ex. 138A-B; 2561-62, 2595, 3059, 3637).

63. On or about May 11, 1934, respondent, National, in connection with the terms and conditions of sale for oxides set forth in Articles I and II of Schedule A of the Lead Code, which was approved shortly thereafter on May 24, 1934, determined to set up zones for the sale and distribution of oxides in southern and western territories to compensate in part for the increased freight charges in those areas (Resp. Ex. 159B-I). Prior to 1934, respondent, National, had on occasion charged freight in addition to a flat price where the freight was more than 25¢ per cwt. for carload shipments and, in connection with less than carload shipments, had charged freight in addition to the price from certain designated warehouses (3060-62, 3075-76).

64. In the early part of June, 1934, respondent, National, made certain changes in the zones for oxides, so that the zones as revised were as follows (Resp. Ex. 159A):

For lots of less than 20 tons ¼¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, California and west of the Cascade Mountains in Oregon and Washington; ½¢ per pound was added in New Mexico, Colorado, Wyoming and Montana; ¾¢ per pound was added in Arizona, Idaho, Nevada, Utah and west of the Cascade Mountains in Oregon and Washington. In addition, for shipments in lots of 20 tons or more, ¼¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada and east of the Cascade Mountains in Oregon and Washington.

65. When these terms were announced to the trade in the latter part of May and the early part of June, 1934
613 by respondent, National respondents Glidden and Eagle-Picher, as well as other manufacturers of oxides,

began to quote similar differentials in the sale and distribution of oxides in the southern and western States just mentioned (1580, 2552-53, 2686). These respondents did not do any considerable business in oxides in the far western States and in quoting similar differentials for the southern and southwestern States these other respondents, who did make sales of oxides, quoted such differentials to meet the terms established by respondent, National, and to obtain some compensation for the greater freight charges incurred by such respondents (id.).

66. There was no agreement at any time between respondent, National, or any of the other respondents engaged in the sale and distribution of oxides as to the use of zones for the sale and distribution of oxides, nor was participation in the use of such zones invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2595, 3059, 3637).

Prices.

67. There was no uniformity or identity of prices among respondents and other manufacturers of lead pigments with respect to the sale and distribution of lead pigments as defined in the amended complaint.

A. White Lead in Oil.

68. Some of the respondents* from time to time issued and published price cards or bulletins in connection with the sale and distribution of white lead in oil (Com. Exs. 659A, B, Q-Z-51, 660A-Z-2, 663A-K, 738A-M) and while, from time to time, the published so-called "list" prices of the respondents were the same, no substantial percentage of the sales of white lead in oil of the respondents was made at list prices (2995). For the most part these respondents received a net return represented by the price at which respondents sold to their dealers or distributors for resale
614 or the sum which they received from their agents who sold to the trade on behalf of such respondents from consigned goods in the hands of the agents (Com. Exs. 752A-Z-144, 754A-Z-60, 772A-Z-31, 795A-Z-14).

69. From time to time after the employment of its

* The methods employed by respondent, Sherwin-Williams are described in the proposed findings submitted by counsel for that company.

agency method in November, 1933, respondent, National, changed the net amount which its agents were required to return to it and determined various quantity and trade prices which the agent under his agency contract agreed to observe (Com. Ex. 656A-B).

70. Respondent, National, has produced white lead in oil under its Dutch Boy label which for a period of more than 35 years has had the highest consumer acceptance and has been recognized in the trade and by the competitors of respondent, National, as being the criterion of quality in the white lead in oil market (2499, 2525, 2895-97, 3513).

71. Respondent, Eagle-Picher, produced white lead in oil under the Eagle brand and under the Hammer brand (1554) and its Eagle brand of white lead in oil was recognized in the trade and by its competitors as occupying a position next to Dutch Boy in consumer acceptance and quality (2525). In setting the amount which it would receive from its agents in the sale of Eagle brand white lead in oil, respondent, Eagle-Picher, usually obtained the same net return which was received by respondent, National, from its agents selling Dutch Boy white lead in oil (Com. Ex. 754A-Z-60). However, although its published prices to the trade were in general similar to those of respondent, National, respondent, Eagle-Picher, did not at all times receive the same or as high a price in its direct sales to the trade of Eagle and Hammer brands of white lead in oil (id.; 3667, 3681). Moreover, in the sale of its Hammer brand of white lead in oil, respondent, Eagler-Picher, received from its agents a net sum which in most instances was ¼¢ a pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (1554).

72. Respondent, Glidden, produced white lead in oil under the Euston label and from 1936 through 1941 re- 615 spondent, Glidden, customarily received from its dealers or distributors ¼¢ to 1/5¢ per pound less than respondent, National, received from its agents in the sale of Dutch Boy white lead in oil (Com. Ex. 772A-Z-31).

73. Respondent, Sherwin-Williams, customarily received prices for its white lead in oil which differed from those of respondent, National (see Proposed Findings of Respondent Sherwin-Williams).

74. Respondent, I. S. & R., produced white lead in oil under the "Anaconda" label and customarily received from

its dealers a price ½¢ per pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (3513).

B. Dry White Lead, Basic Carbonate.

75. In the sale of dry white lead, basic carbonate, respondent, National's Dutch Boy brand was again the criterion of quality with the highest consumer acceptance among paint manufacturers, the chief purchasers of this product (2499, 2525).

76. While, for the most part (Com. Ex. 754A-Z-60), respondent, Eagle-Picher, was able to secure for its dry white lead, basic carbonate, a price as high or in most instances nearly as high as the price received by respondent, National, for its dry white lead, basic carbonate, on occasion Eagle-Picher received from purchasers in large quantities a price for its dry white lead, basic carbonate, which was ½¢ per pound less than that received by respondent, National, for its dry white lead, basic carbonate (id.). In addition, respondent, Eagle-Picher, could produce more cheaply than its competitors basic sulphate of lead from its own mines in the Tri-State area and beginning about 1930 respondent, Eagle-Picher, stressed the sale of basic sulphate of lead (either as such or as combined with zinc oxide to form leaded zinc oxide) to paint manufacturers, and from 1936 to 1941 its sales of basic sulphate of lead were in excess of its sales of dry white lead, basic carbonate (1561-62, 3421, 3437, 3352, 3357, 4129). In addition, its production of leaded zinc oxide during 1941-1942 was three and one-half times its production of basic sulphate of lead (3357).

616 None of the other respondents stressed the sale of basic sulphate of lead and none had facilities for the production of basic sulphate of lead in the same quantities produced by respondent, Eagle-Picher. Respondent, Eagle-Picher, customarily sold basic sulphate of lead to paint manufacturers at ½¢ per pound less than it sold dry white lead, basic carbonate (3347, 3382).

77. Respondent, Glidden, up until 1941 customarily sold dry white lead, basic carbonate, at 1/5¢ per pound less than the price at which respondent, National, sold its dry white lead, basic carbonate (Com. Ex. 772A-Z-31). By 1941, respondent, Glidden, having improved the quality of its dry white-lead, basic carbonate (2489, 2534), was then able to command a price as high but no higher than the price of

respondent, National, for its dry white lead, basic carbonate (Com. Ex. 772A-Z-31).

78. Respondent, Sherwin-Williams, accounted for less than 1% of the sales of dry white lead, basic carbonate, for the period from 1930 to 1941.

79. In the latter part of the decade 1930-1940 respondent, I. S. & R., customarily sold its dry white lead, basic carbonate, at the same price that respondent, National, received for its dry white lead, basic carbonate (3505).

80. With respect to both dry white lead, basic carbonate, and white lead in oil, in the early part of the twentieth century and through the decade from 1920 to 1930 the market had been flooded by many adulterated products purporting to be pure white lead in oil or pure dry white lead, basic carbonate (2502-03, 3514-15). There thus had been created in the minds of the trade, which had come to recognize Dutch Boy dry white lead, basic carbonate, and white lead in oil as the criterion of quality, a feeling that any brand of white lead in oil or dry white lead, basic carbonate, which sold for prices substantially lower than the prevailing prices at which Dutch Boy white lead in oil and dry white lead were being sold, was in all probability an 617 adulterated product (id.). Thus the constant endeavor of respondents, other than respondent, National, was to improve the quality of their product so that they might receive the same or approximately the same price (id.). In addition, respondent, National, was the only multiple producer of basic carbonate of white lead, dry and in oil, and had efficient methods of production as well as a large production of such products (2500). At no time could the respondents (other than respondent Sherwin-Williams) get a price higher than that obtained by respondent, National, and they could not afford to charge a price much lower without losing money or without incurring the resistance of the trade from the feeling that such products were probably adulterated (2502-03, 3514-15).

C. Oxides.

81. In 1927 respondent, National, established minimum differentials over pig lead for the sale of litharge and red lead of 1½¢ and 2½¢ per pound respectively (Resp. Ex. 177A-B). The prices charged for red lead and litharge were changed when pig lead changed as much as 5¢ per cwt. and usually published price changes were made when pig

lead advanced or decreased as much as 25¢ per 100 pounds (1637-38). In 1927 the respondent, National, also adopted a price for less than carload lots for litharge and red lead of 2½¢ and 3½¢ per pound over pig lead (Resp. Ex. 177A-B).

82. Since 1927, respondent, Eagle-Picher, and since shortly after 1929 when it acquired Metals Refining Company, respondent, Glidden, have customarily followed the prices set by respondent, National, in the sale of red lead and litharge (1618, 2545, 2552-53). In addition, Hammond Lead Company, Hammond, Indiana, not a respondent in this proceeding, has produced and sold red lead and litharge (1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022). Some of the larger battery manufacturers have also produced red lead and litharge for their own use (1647).

83. The chief purchasers of red lead and litharge in dry form have been battery manufacturers who purchased
618 the material as one of the chief raw materials used in the manufacture of electric storage battery plates (1601-02, 1641-42). The red lead and litharge produced by respondent, Glidden, respondent, Eagle-Picher, and respondent, National, as well as by the other manufacturers of litharge and red lead, have not been identical and while many manufacturers prefer the products manufactured by respondent, National, others have preferred those manufactured by respondent, Eagle-Picher, or respondent, Glidden, or the products produced by other manufacturers of red lead and litharge who are not respondents in this proceeding (1726-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22). In addition, respondents, National, Eagle-Picher and Glidden, have offered technical services and advice on methods of manufacture of storage batteries and both respondent, Eagle-Picher, and respondent, National, have well staffed technical and laboratory departments whose chief duty it is to consult with battery manufacturers on the type of red lead or litharge needed by any such manufacturer and who give technical advice as to methods of manufacture (3443, 3453, 3464-65).

84. In the sale of lead pigments and oxides to governmental agencies, all of the respondents who produce and sell such products have made bids to governmental agencies and have sold to such governmental agencies at prices greatly at variance with each other where the governmental award involved quantities varying from 5,000 pounds to 1,000,000 pounds and covered such products as white lead

in oil, dry white lead, basic carbonate, dry red lead and litharge (4095-96; Resp. Exs. 306A-B, 307A-B, 308A-C).

85. Sales to governmental agencies by manufacturers engaged in interstate commerce are not subject to the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Terms and Conditions of Sale.

86. Respondents have never agreed to fix nor has there been any common or concerted action among respondents (other than action taken in connection with the formu- 619 lation of supplementary codes during N. R. A. days) to fix terms and conditions at which lead pigments are sold and offered for sale in commerce (2561-62, 2996, 3508-09, 3539, 3637, 3662).

87. Some of the respondents and other manufacturers of oxides, red lead and litharge and dry white lead, basic carbonate, did agree, for purposes of the Code, to include as Schedule A of the Lead Code (Com. Ex. 809) certain conditions for the sale of oxides in less than 20 tons, for the sale of oxides in lots of at least 20 tons and for the sale of basic lead carbonate, dry white lead. Many of the terms and conditions set forth in Schedule A of the Lead Code had been used by respondent, National, and followed by some of the other respondents prior to 1933 (Resp. Exs. 181A-B; Com. Exs. 659A, B, Q-Z-51). The only significant changes set forth in Schedule A of the Lead Code were with respect to the sale of lead oxides in 5 ton lots and in connection with the sale of dry white lead, basic carbonate, in lots of less than 20 tons. With respect to the price for the sale of oxides in 5 ton lots, Article 1 of Schedule A provided that the price thereof be not more than ½¢ per pound less than the seller's card or quoted price. Article 3 of Schedule A provided that the price for a minimum of 20 ton lots of dry white lead, basic carbonate, should be not more than ½¢ less per pound than that charged for smaller quantities (Com. Ex. 809).

88. While exemption was obtained by respondents and other manufacturers of lead pigments from the requirements of Schedule A, while the Code was in effect (Com. Ex. 507A-C, Resp. Exs. 6A-I, 7A-C, 8A-B, 9A-F), respondents were permitted to follow the term thereof (Section 5, National Industrial Recovery Act, 48 Stat. 195, 198) and

in general respondent, National, and respondent, Eagle-Picher, did follow the terms and conditions of sale set forth in Schedule A during the time that the Lead Code was effective (Resp. Ex. 159A-J; 1617).

89. After the N. R. A. was declared unconstitutional, respondent, National, as a matter of individual choice followed most of the terms and conditions of sale theretofore set forth in Schedule A of the Lead Code with respect to oxides and dry white lead, basic carbonate, but not all the terms have been followed nor has there been any rigid adherence to such terms on the part of respondent, National (Resp. Ex. 182; 1650-54, 1657-58).

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90. Since June, 1935 respondent, Eagle-Picher, as a matter of individual choice has in general followed some of the terms and conditions theretofore set forth in Schedule A of the Lead Code but not all of such conditions (1612-17).

91. There was no agreement or understanding between respondent, National, and respondent, Eagle-Picher, or any other respondent since June, 1935 with respect to the terms and conditions of sale of lead oxides, dry white lead, basic carbonate, or any other lead pigment (2561-62, 2996, 3508-09, 3539, 3637, 3662).

92. There was no exchange of price information between respondents either through Lead Industries Association or otherwise at any time even during the N. R. A. days (2187-88).

93. There was no agreement to fix prices nor any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N. R. A. days (see Reasons for Findings).

94. There was no agreement or concerted action among respondents to curtail production at any time even during the N. R. A. days (see Reasons for Findings).

95. At no time did respondents either through Lead Industries Association or by any other method exchange freight factors, freight rates, individual production data, items of past, present or future individual transactions, prices, or any other individual sales, freight or production factors (2186-88).

96. There was no agreement nor planned common course of action among respondents at any time to adopt or maintain any system of delivered price quotations with respect to lead pigments (see Reasons for Findings).

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97. Respondent, National, heretofore has entered into

contracts with E. I. duPont de Nemours Co., Inc., in which respondent, National, agreed to convert pig lead belonging to E. I. duPont de Nemours Co., Inc. into basic carbonate of white lead (Com. Ex. 797C-Z-6), but these contracts have had no effect upon the prices charged by respondent, National in its sale of white lead products.

98. Respondents have customarily sent to dealers or distributors who purchase direct from them suggested resale prices in connection with the sale of white lead in oil and lead pigments in kegs of 100 pounds or less (Answers of Respondents).

99. Respondent, National, and some of the other respondents, in the sale and distribution of lead pigments in kegs of 100 pounds or less, have employed the same zone basis as is used by respondent, National, in the sale and distribution of white lead in oil (Answers of Respondents).

100. Respondent, National, has sold keg products in 12½ pound, 25 pound, 50 pound and 100 pound kegs, for which customarily it has charged a 25¢ differential above 100 pound kegs for 50 pound kegs, a 25¢ differential above 50 pound kegs for 25 pound kegs, and a 25¢ differential above 25 pound kegs for 12½ pound kegs and some of the other respondents who produce such keg products have followed the differentials established by respondent, National (Answers of Respondents).

101. In connection with the sale of white lead, basic carbonate, whether dry or in oil, some of the respondents have entered into quarterly contracts covering terms of sale and delivery with paint manufacturers and with industrial consumers of such products and in connection with all lead pigments and oxides respondents have from time to time issued price cards or price bulletins to the trade (An-
622 swers of Respondents; Com. Exs. 659A, B, Q-Z-51, 660A-Z-2, 663A-K, 662A-Z-26, 661A-M, 738A-M).

102. None of the above practices or acts of the respondents has been unfair or to the prejudice of the public; none has deprived the public of the benefit of competition; none has created discrimination against any buyers of lead-pigments or lead pigment paint; none has had any tendency or capacity unreasonably to restrain commerce in said products or has actually hindered, frustrated, suppressed or eliminated competition in lead pigments in commerce; and none of the acts or activities of the respondents has constituted unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of

Section 5 of the Federal Trade Commission Act (see Reasons For Findings).

103. There has been at all times and there continues to be active competition among respondents and others in the production and sale of lead pigments, with respect to prices, quality, services and the different commodities produced by the respective respondents (see Reasons For Findings).

As To The Charge Of Price Discriminations.

104. The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers located in any given zone were not and do not constitute discriminations in price as to such purchasers of lead pigments (See Reasons For Findings).

105. The practice and custom of respondent, National, in selling lead pigments to purchasers located in different zones carrying different prices were not and do not constitute discriminations in price as to such purchasers of lead pigments (see Reasons For Findings).

106. The practice and custom of respondent, National, in selling lead pigments at different prices to various classes of customers were not and do not constitute discriminations in price as to such classes of customers purchasing lead pigments (see Reasons For Findings).

623 107. The practice and custom of respondent, National, in selling lead pigments at different prices for different quantities of such pigments were not and do not constitute discriminations in price with respect to purchasers of such lead pigments in different quantities (see Reasons for Findings).

108. None of the customs and practices of respondent, National, nor the methods of sale employed by respondent, National, in the sale and distribution of lead pigments have constituted or result in discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

Conclusions of Law.

1. This proceeding is subject to the provisions of the Administrative Procedure Act (see Reasons for Findings).

2. None of the material allegations of the amended complaint is supported by or is in accordance with the re-

liable, probative and substantial evidence adduced by the hearings in this matter, nor are the material allegations of the amended complaint supported by the greater weight of the evidence so adduced at the hearings in this matter (see Reasons for Findings).

3. The acts of the respondents herein in connection with the preparation of the Lead Code and the supplementary code for the manufacturers of lead pigments and the acts taken in connection with the Lead Code itself cannot be made the basis of a charge of violation of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

4. The price paid by purchasers of lead pigments is that sum paid to the manufacturers, including these respondents, by the purchaser for delivery of the product to such purchaser (see Reasons for Findings).

624 5. Respondents have not violated and are not violating the provisions of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

6. Respondents have not violated and are not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

7. This proceeding is not in the public interest (see Reasons for Findings).

8. The Federal Trade Commission should enter an order herein dismissing the amended complaint on the merits (see Reasons for Findings).

Reasons for Findings.

1. As to Findings of Fact 1 and 2:

The pleadings and the uncontroverted testimony.

2. As to Findings of Fact 3 to 18, inclusive, 20 to 40, inclusive, 42 to 92, inclusive, 95, and 97 to 101, inclusive:

The pleadings, the uncontroverted evidence and the reliable, probative and substantial evidence herein. Some of these findings will be discussed in more detail hereinafter.

3. As to Finding of Fact 19:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

4. As to Finding of Fact 41:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which

an inference could reasonably be drawn, that there was any agreement at any time between respondent, National, and respondent, Eagle-Picher, or any other respond-
625 ent as to the use of the agency method in the sale and distribution of white lead in oil or that participation by the other respondents in the use of the agency method was at any time invited or suggested by respondent, National and it is the reasonable inference from the uncontroverted evidence and the reliable, probative and substantial evidence herein that respondent, National, determined to employ the agency method in the sale and distribution of white lead in oil, regardless of the action of any other manufacturer of white lead in oil.

5. With respect to Findings of Fact 50 to 66, inclusive, respondent, National, refers to and incorporates herein the arguments it made in its statement and brief in support of its motion to dismiss the amended complaint filed with the Federal Trade Commission on February 25, 1947, at pages 24 to 27, inclusive, thereof.

With respect to Findings of Fact 62 to 66, inclusive, set forth above, respondent, National, submits that the said findings are fully supported by the reliable, probative and substantial evidence therein referred to. It further submits that Com. Ex. 808 A-N is entitled to no weight whatsoever in connection with the establishment by respondent, National, of zones for oxides (red lead and litharge). In the first place, respondents objected to the offer of this document in evidence and the record clearly shows that the statements therein contained were purely hearsay (1112, 1116, 1134-38). More particularly, certain statements in Com. Ex. 808 E and F to the effect that the manufacturers of oxides had not definitely established the proposed zones for red lead and litharge as of June 4, 1934 are directly contrary to the reliable, probative and substantial evidence contained in Res. Ex. 159 B-J, which shows that respondent, National, itself adopted zones for red lead and litharge on May 11, 1934 without agreement or understanding with any other manufacturer of such products.

6. With respect to Finding of Fact 84, the record contains uncontroverted evidence (therein specifically referred to) that on bids to the United States Treasury Department, the United States Navy and the Panama Canal the respondents and others made the following bids:

1939

2/17	U. S. Navy	128,400 lbs.—50—100—bbls. Dry Red	*Evans	$ 9562.50	1%—30 except(")
			E-P	9854.20	1%—30 except(")
			S-W	9854.52	1%—10 except(")
			Metals Ref.	9754.50	net
			Heyward Pt.	10393.98	¼%—10
		200,000 lbs.—bbls. Dry White	*S-W	6.84	1%—10
			J. T. Lewis	6.93	net
			E-P	7.00	1%—30
			Mamolith	7.25	1%—10
4/ 3	Panama Canal	100,000 lbs.—100s Wh. L-in-O.	*Wetherill & Bro.	$ 7670.	
			E-P	7690.	
			Mamolith	7700.	
			S-W	8580.	
7/18	U. S. Navy	12,300 lbs. 100s—25s Litharge	*S-W	$ 847.05	1%—10
			E-P	905.50	1%—30
			J. T. Lewis	907.50	1%—30
			Metals Ref.	968.75	1%—10
			Hammond	971.00	net
		123,200 lbs.—100s—50s—25s Dry Red bbls.	*S-W	9151.45	1%—10
			E-P	9353.00	1%—30 ##
			J. T. Lewis	9356.25	1%—10 ##
			Metals Ref.	9472.25	1%—10
			Hammond	9467.00	net
	## Except 600 lbs.—net cash.				
		200,000 lbs.—bbls. Dry White	*S-W	$6.85	1%—10
			J. T. Lewis	7.00	1%—10
			Mamolith	7.00	1%—30
			E-P	7.00	1%—30
12/12	Panama Canal	100,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis	7.94	
			E-P	8.04	
			Mamolith	8.50	
			S-W	9.00	

				1940 WL-O	D.R.
7/19	Panama Canal	200,000# Wh. L-in-O. 50,000# Dry Red	E-P	7.69	8.00
			Evans	—	8.60
			Hammond	—	8.50
			J. T. Lewis	7.63	8.00
			Mamolith	*7.62	—
			Metals Ref.	—	*7.95
			S-W	8.60	9.00

1940 (Continued)

7/30	U. S. Navy	366,200 lbs.—all sizes Dry Red	*E-P	$28,645.25		
			Evans	28,669.50		
			Metals Ref.	28,669.50		
			Hammond	29,500.50		
			J. T. Lewis	28,669.50		
			S-W	29,175.42		
		17,200 lbs.—50s Litharge	*E-P	8.25	1%	
			Evans	8.25	1%	
			Metals Ref.	8.75	net	
			Hammond	8.91	net	
			J. T. Lewis	8.25	1%	
		200,000 lbs.—bbls. Dry White	*Kraft Chem. Co. (MacGregor)	6.80	1%—20	
			E-P	6.90	net	
			J. T. Lewis	6.93	net	
			Mamolith	6.74	net	
			S-W	7.25	1%—20	
9/ 9	Panama Canal	400,000 lbs.—100s Wh. L-in-O.	J. T. Lewis	7.47	net	
			E-P	7.47	net	
			*Mamolith	7.42	net	
			S-W	7.98	1%—20	
		20,000 lbs. Dry Red	*S-W	7.15	1%—20	
			J. T. Lewis	8.25	1%—30	
			E-P	8.25	net	
			Evans	8.25	1%—30	
			Hammond	8.75	1%—20	

				WL-O	D.R.
12/10	Panama Canal	200,000 lbs. Wh. L-in-O. 60,000 lbs. Dry Red	J. T. Lewis	*7.47	—
			E-P	7.68	8.50
			Mamolith	8.50	—
			S-W	8.45 1%—20	9.00
			Evans	—	*8.45
			Metals Ref.	—	8.75
			Hammond	—	10.00

1941

1/ 9	U. S. Navy	261,800 lbs.—100s Dry Red	*Evans	8.40	net
			E-P	8.50	net
			Metals Ref.	8.50	net
			S-W	9.50	1%—20
			Hammond	10.00	net
		400,000 lbs.—bbls. Dry White	*Mamolith	7.38	net
			J. T. Lewis	7.42	net
			E-P	7.50	1%—30
			S-W	7.50	1%—30

1941 (Continued)

3/28	U. S. Navy	200,000 lbs.—100s Wh. L-in-O.	*Mamolith	7.28	
			Int. Sm. & Ref.	7.49	
			J. T. Lewis	7.59	
			S-W	7.74	
			E-P	8.75	
5/22	U. S. Navy	348,900 lbs.—100s Dry Red	*J. T. Lewis	9.70	1%—30
			S-W	10.25	1%—20
			Metals Ref.	10.00	net
			Hammond	10.25	net
			E-P	9.75	1%—30
		500,000 lbs.—bbls. Dry White	*J. R. MacGregor	7.38	
			J. T. Lewis	7.39	
			Mamolith	7.42	
			E-P	7.42	
			S-W	7.50	
7/18	U. S. Treas. Dept.	200,000 lbs.—100s Wh. L-in-O.	*J, T. Lewis	8.47	
			Mamolith	8.80	
			E-P	8.79	
			Int. Sm. & Ref.	9.49	
9/23	U. S. Treas. Dept.	440,000 lbs.—100s Wh. L-in-O.	*Mamolith	8.57	
			J. T. Lewis	8.82	
			E-P	9.80	
10/24	U. S. Navy	1,000,000 lbs.—bbls. Dry White	J. R. MacGregor	7.50	2%—10
			J. T. Lewis	# 7.40	
			E-P	7.50	1%—30
			Mamolith	% 7.35	
			S-W	7.50	
				# Awarded 800,000 lbs.	
				% " 200,000 lbs.	

Note: Mamolith & S-W both restricted their quantity to 200,000 lbs. Navy would not accept MacGregor quotation because it was based on $5.85 pig lead with adjustment in case of an advance.

		200,000 lbs.—100s Dry Red	*Evans	8.30	
			E-P	8.35	
			Hammond	8.35	
			Metals Ref.	9.10	
			S-W	Could not quote.	

* Awarded bids.

In the above tabulations, "Mamolith" is a trade name of respondent, Glidden; "E-P" stands for respondent, Eagle-Picher; "S-W" refers to respondent, Sherwin-Williams; "J. T. Lewis" and "Evans" refer to respondent, National, and "Metals Ref." refers to Metals Refining Company, a division of respondent, Glidden.

629 Sales to governmental agencies are not governed by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Therefore, where the strictures of the Robinson-Patman Act did not apply, it is obvious that the respondents engaged in vigorous and active price competition.

Moreover, Findings of Fact 68 to 83, inclusive, set forth the reliable, probative and substantial evidence to show competition among respondents and other manufacturers of lead pigments and related products with respect to prices, quality, service and the different commodities produced by the respective companies. Price competition with respect to sales governed by the Robinson-Patman Act was not as vigorous or as marked as in those cases involving sales to governmental agencies where the Robinson-Patman Act does not apply. However, price competition does not mean price warfare. An attempt to indulge in such price competition by any of the respondents or other manufacturers of lead pigments might well have constituted a violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. A. Sec. 13a), which makes it unlawful, under penalty of fine or imprisonment, for any person engaged in interstate commerce "* * *" to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

7. As to Findings of Fact 93, 94 and 96:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which an inference could reasonably be drawn, that there was any agreement to fix prices or any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N. R. A. days, or that there was any agreement or concerted action among respondents to curtail production at any time even during the N. R. A. days, or that there was any agreement or planned common course of action among respondents at any time to adopt or maintain any system of delivered price quotations with respect to lead pigments.

630 8. As to Finding of Fact 102:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

9. As to Finding of Fact 103:

The reliable, probative, substantial and uncontroverted evidence herein establishes that there has been at all times and that there continues to be active competition among respondents and others in the production and sale of lead pigments with respect to prices, quality, services and the different commodities produced by the respective respondents in this proceeding. In addition, this is also a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

10. As to Finding of Fact 104:

The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers, located in any given zone or territory do not constitute discrimination in price as to such purchasers. A flat uniform price to all purchasers cannot result in any discrimination in price since there is no difference in price to the respective purchasers. As was stated by the Supreme Court in *Trade Commission* v. *Staley Co.*, 324 U. S. 746, at page 757:

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, *or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.*" (Italics ours.)

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, contains the following proviso:

> "*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery
631 resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *".

In connection with the words in this proviso which read "* * * which make only due allowance * * *", the Senate Committee Report No. 1502, dated February 3, 1936, states in part as follows (CCH, Trade Regulation Service, Par. 2212):

> "This phrase is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials, as well as those on account of selling and transportation costs.

It marks the zone within which differentials may be granted. *The bill neither requires nor compels the granting of discriminations or differentials of any sort. It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost,* or to grant any differentials not in excess of such differences." (Italics ours.)

11. As to Finding of Fact 105:

With respect to the custom and practice of respondent, National, in selling white lead in oil in different zones at differentials of fractions of a cent over the base or par price, there is no evidence nor any reliable, probative and substantial evidence that this method of sale in any way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that the differentials over the base price charged in the differential zones do not exceed the difference between the average cost of delivering the white lead in oil to purchasers in the par or base zone and the similar average costs of delivering white lead in oil to purchasers in the respective differential zones. (Resp. Exs. 165A-O, 166A-B, 169A-N, 170A-B, 171, 162A-D, 213A-Q, 214.) The zones for white lead in oil were not artificial and in substance have been employed by the National Lead Company at least as far back as 1910 (Finding of Fact 50 above). Moreover, for many years respondent, National, has made between 75% and 80% of its sales of white lead in oil in the so-called par or base zone (Resp. Exs. 151A-B, 152, 153; 3966).

632 With respect to the two zones employed by respondent, National, in the sale and distribution of dry white lead, namely the par zone, covering all of the States of the United States in the east, south and midwest, and a differential zone carrying a differential ½¢ per pound for the States west of the line formed by the eastern boundaries of New Mexico, Colorado, Wyoming and Montana, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of dry white lead or in any other way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

With respect to the practice and custom of respondent,

National, in selling oxides (red lead and litharge) upon the zone basis referred to above in Finding of Fact 64 herein, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of oxides (red lead and litharge) or in any other way violates Section 2(a) of the Clayton Ast, as amended by the Robinson-Patman Act.

12. As to Finding of Fact 106:

The practice and custom of respondent, National, in selling lead pigments at different prices to different classes of customers do not constitute discriminations in price with respect to such classes of customers within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that there is no competition between such classes of customers and therefore the different prices to the different classes could not have any competitive effect as between purchasers belonging to the respective classes of customers (2994-95, 3964-65).

633 13. As to Finding of Fact 107:

The practice and custom of respondent, National, in selling white lead in oil at different prices for different quantities of such pigments (Com. Ex. 656A-B) do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of white lead in oil in the different quantities at the different quantity prices.

The practice and custom of respondent, National, in selling dry white lead at different prices for different quantities of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of dry white lead in the different quantities at the different quantity prices.

The evidence establishes that respondent, National, since 1934 has sold dry white lead in lots of less than 20 tons (less than carload lots) at a price of ¼¢ a pound more than the price charged by respondent, National, for lots of dry white lead in 20 tons or more (carload lots). The reliable, probative and substantial evidence herein establishes that this differential of ¼¢ per pound does not exceed the difference between the cost of sale and delivery of dry white lead in carload lots and the cost of sale and delivery of dry white lead in less than carload lots (4050-65; Res. Exs. 215A-B, 216, 217).

The practice and custom of respondent, National, in selling oxides (red lead and litharge) at different prices for different quantities of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice
634 and custom have any competitive effect upon purchasers of oxides (red lead and litharge) in the different quantities at the different quantity prices. The testimony of battery manufacturers who purchased oxides in different quantities at the different quantity prices does not constitute reliable, probative and substantial evidence that there was any adverse effect upon competition as a result of such quantity prices. The evidence of such battery manufacturers herein shows even less competitive effect than did the testimony which was declared to be insufficient to show discriminations in price as the result of quantity differentials in *Morton Salt Co.* v. *Federal Trade Commission*, 162 F. 2d 949 (C. C. A. 7th, 1947).

With respect to the custom and practice of respondent, National, in selling lead pigments in kegs of 12½, 25, 50 and 100 pounds at differentials as set forth in Finding of Fact 100 above, the record contains no evidence nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such differentials constituted discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The uncontroverted evidence is to the effect that such differentials in price do not exceed the differences in the costs of manufacture of such keg products in such quantities (Res. Ex. 309; 4175-76).

14. As to Finding of Fact 108:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

15. As to Conclusion of Law 1:

This is covered by the provisions of the Administrative Procedure Act itself and, in addition, the Trial Examiner has ruled that this proceeding is governed by the provisions of the Administrative Procedure Act (1903).

16. As to Conclusion of Law 2:

This follows as a conclusion of law from the Findings of Fact set forth above.

635 17. As to Conclusion of Law 3:

The National Industrial Recovery Act, by Section 5, provided:

> "While this title is in effect * * and for sixty days thereafter, any code, under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States." (48 Stat. 195, 198, Act of June 16, 1933).

On June 14, 1935, Congress repealed the provisions of the NRA Act delegating power to the President of the United States to prescribe codes and to provide for enforcement, but in the same act Congress provided that the exemption from the anti-trust laws originally given in Section 5 of the National Industrial Recovery Act, above quoted, should continue with respect to agreements by members of an industry relating to labor conditions and unfair competitive practices which offend against existing laws (49 Stat. 375).

18. As to Conclusion of Law 4:

This follows as a conclusion of law for the reasons given above in connection with Finding of Fact 104 (Paragraph 10 above).

19. As to Conclusions of Law 5, 6, 7 and 8:

These follow as conclusions of law from the Findings of Fact set forth above.

The Administrative Procedure Act (Section 8[b]) provides that in hearings before an administrative agency the respondents shall have a "reasonable opportunity" to submit proposed findings and conclusions to the official who presided at the reception of the evidence. On November 20, 1947 the Trial Examiner herein ruled that

all proposed findings, conclusions and the reasons therefor should be submitted to him on or before December 1, 1947. On the same day, namely, November 20, 1947, the respondents formally requested the Federal Trade Commission to extend their time to file such proposals and the reasons therefor until February 15, 1948. The Federal Trade Commission, by order dated December 5, 1947, 636 denied such request but extended respondents' time for filing such proposals and the reasons therefor until December 29, 1947. Respondent, National, respectfully submits that, in view of the size of the record herein and the importance of this proceeding, the time granted by the Federal Trade Commission for the submission of proposed findings and the reasons therefor is inadequate.

Respectfully submitted,
Alexander & Green,
James D. Ewing,
of Counsel,
Attorneys for Respondent,
National Lead Company,
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No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
of Counsel.

637 BEFORE THE FEDERAL TRADE COMMISSION.

(Received Dec. 29, 1947.)

* * (Caption—5253) * *

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their attorneys, Edmund P. Wood and Richard Serviss, and submit the following proposed findings of fact, conclusions of law, and reasons therefor:

1. These respondents adopt the proposed findings of fact, conclusions of law and reasons therefor submitted by the respondent, National Lead Company.

2. Additionally, these respondents request the following specific findings of fact:

(a) The Eagle-Picher Company and The Eagle-Picher

Sales Company (hereinafter called Eagle-Picher) engage in the business of selling lead pigments in interstate
638 commerce throughout the United States in which business they are second in size to National Lead Company (hereinafter called National). Due to the difference in sizes of the two companies, Eagle-Picher is not in a position to compete with National, on lead pigments manufactured from pig lead, by means of a general policy of price cutting or price war. Nevertheless, it is the policy of Eagle-Picher to compete with National in the sale of lead pigments and Eagle-Picher does so compete actively by means of research which develops different and better products, by means of sales service, by means of technical service to customers providing them with the benefit of Eagle-Picher's research facilities, and by means of national advertising intended to increase consumer acceptance of the Eagle-Picher products.

(b) Particularly, Eagle-Picher research has developed special pigments known as basic lead sulphate, leaded zinc oxide and blue lead which Eagle-Picher manufactures from its own raw materials and sells in competition with pigments manufactured from pig lead. All of the Eagle-Picher organization has been actively engaged in promoting consumer acceptance and greater utilization of these products in competition with those promoted by the other respondents herein.

639 (c) Eagle-Picher's research laboratories have developed many special lead oxides for the storage battery industry and Eagle-Picher's technical experts have instructed the company's customers in the manner of their use, which has improved the competitive position of the Eagle-Picher customers in relation to that of the customers of National and that of the large battery manufacturers which produce their own lead oxides.

(d) Eagle-Picher has not indulged in any unfair method of competition by conspiracy or otherwise.

(e) Eagle-Picher has not discriminated among its customers in its sale of lead pigments.

(f) Eagle-Picher cannot compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants.

3. These proposed findings are supported by the records as a whole and particularly by the testimony of the

witnesses produced by The Eagle-Picher Company and the exhibits introduced in connection with their testimony:

	Getz	3328 As to proposed findings (a) and (b)
	Harner	3416 As to proposed findings (a), (b) and (c)
	Chubb	3462 As to proposed findings (c)
640	Vasterling	3591 As to proposed finding (b)
	Mitchell	3620 As to proposed finding (c)
	Bowlbey	3632 As to proposed finding (a)
	Hayt	3659 As to proposed finding (a) and (b)

Respectfully submitted,

Edmund P. Wood,
Richard Serviss,
Attorneys for respondents, The Eagle-Picher Company, The Eagle-Picher Sales Company.

641 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

PROPOSED FINDINGS, CONCLUSIONS AND REASONS THEREFOR.

(Received Dec. 29, 1947.)

Comes Now the respondent, Anaconda Copper Mining Company, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and submits the following proposed findings and conclusions, together with its reasons therefor:

1. The Anaconda Copper Mining Company (hereinafter referred to as "Anaconda") is a Montana corporation, with its principal office located at 25 Broadway, New York 4, New York. (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

2. Anaconda has never been engaged in the manufacture or sale of lead pigments. (Com. Ex. 836A-N; Affidavit of E. O. Sowerwine, Vice President of Anaconda in sup-
642 port of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: There is no evidence that Anaconda was ever engaged in the manufacture or sale of lead pigments, and there is substantial evidence that it was not so engaged.

3. Anaconda has no present intention of entering into the business of the manufacture or sale of lead pigments. (Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: The only evidence in the case as to the intention of Anaconda with regard to entering the manufacture or sale of lead pigments is an unqualified statement from a Vice President of that Company that it has no such intention.

4. There is no reason to believe that Anaconda or any of its subsidiaries will ever enter into or engage in the manufacture or sale of lead pigments. (Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544.)

Reason: There is no evidence in the record of any intention on the part of Anaconda or any of its sub-
643 sidiaries to enter into the business of the manufacture or sale of lead pigments in the future, and there is an unqualified statement by the Vice President of Anaconda that it has no such intention.

5. Anaconda did not, nor did any of its officers, directors, employees, representatives or agents, combine, conspire or cooperate with any of the other respondents, or with any of their officers, directors, employees, representatives or agents, or any other person, for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sale of lead pigments in commerce. (pp. 3508-3510, 3539-3541.)

Reason: There is no evidence in the record of any such combination, conspiracy or cooperation, and there is uncontroverted testimony that such was not a fact.

Conclusions of Law.

1. Anaconda has not manufactured and does not manufacture or sell any of the lead pigments that are the subject matter of this complaint, and its joinder as a respondent in this proceeding was, therefore, without justification and improper.

2. Anaconda has not combined or conspired or co-
644 operated with any of the respondents for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sales of lead pigments in commerce.

3. Anaconda has not engaged in any unfair, oppressive or discriminatory acts, methods or practices in connection with the sale or offers to sell lead pigments in commerce.

4. Anaconda has not discriminated in prices between purchasers of lead pigments of like grade and quality sold for use, consumption or resale within the several states of the United States and the District of Columbia, or has not systematically sold such commodities to any purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users.

5. The fact that Anaconda may have owned a controlling interest or all of the stock of a corporation does not make it responsible for the actions of such subsidiary, nor would that fact make it a proper party to this action if such subsidiary had been engaged in the manufacture and sale of lead pigments. This is a well established legal principle for which there is ample authority as is evidenced by the following cases:

Martin v. *Development Co. of America*, 240 Fed. 42 (C. C. A. 9th, 1917).

Majestic Company v. *Orpheum Circuit*, 21 F. (2d) 720 (C. C. A. 8th, 1927).

645 *Esmond Mills* v. *Commissioner of Internal Revenue*, 132 F. (2d) 753 (C. C. A. 1st, 1943).

Schenley Corporation v. *United States*, 326 U. S. 432 (1945).

6. None of the material allegations of the amended complaint as to the respondent, Anaconda, is supported by any evidence which has been produced at the hearings in this matter.

7. Anaconda has not violated and is not violating the provisions of Section 5 of the Federal Trade Commission Act.

8. Anaconda has not violated and is not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

9. The Federal Trade Commission should enter an order herein, dismissing the amended complaint as to the respondent, Anaconda.

Chadbourne, Wallace, Parke & Whiteside,
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Borough of Manhattan,
City of New York 4,
Attorneys for Respondent, Anaconda Copper Mining Company.

646 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

PROPOSED FINDINGS, CONCLUSIONS AND REASONS THEREFOR.

(Received Dec. 29, 1947.)

Comes Now the respondent, International Smelting and Refining Company, by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and submits the following proposed findings and conclusions, together with its reasons therefor:

1. The International Smelting and Refining Company (hereinafter referred to as "International") is a Montana corporation, with its principal office located at 25 Broadway, New York 4, New York. (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

2. International is a wholly owned subsidiary of respondent, Anaconda Copper Mining Company (herein-
647 after referred to as "Anaconda.") (Paragraph "Three" of Amended Complaint and Paragraph "Three" of Amended Answer thereto.)

Reason: Alleged in complaint and admitted in answer.

3. International manufactured and sold the lead pigments which it produced, namely dry white lead and white lead-in-oil, from October 31, 1936 until the latter part of July, 1946. (Com. Ex. 836A-B; pp. 3489-3510.)

4. The plant at which International produced the lead pigments which it manufactured was located at East Chicago, Indiana. (Com. Ex. 836A-B; p. 3489.)

5. Anaconda Lead Products, a Delaware corporation, in 1920 commenced regular production and sales of dry white lead at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International on October 31, 1936. (Com. Ex. 836A; pp. 3489-3490.)

6. Anaconda Lead Products Company first began to manufacture white lead-in-oil in 1931 at the plant at East Chicago, Indiana, and continued such production and sale until said plant was acquired by International in 1936. (Com. Ex. 836A.)

7. In 1920, Anaconda owned 75% of the stock of the Anaconda Lead Products Company, the remaining 25% being acquired in 1936 prior to its dissoluition. (Com. Ex. 836A; p. 3489.)

648 8. On June 1, 1946, International advised the trade that it had been decided to permanently discontinue production of dry white lead. Production of dry white lead was stopped on June 16, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3541-3542.)

9. On June 20, 1946, International advised the trade that it had been decided to permanently suspend operations at the East Chicago plant of International and discontinue the business. Production of white lead-in-oil was stopped on July 23, 1946, and no further orders were accepted for that material after August 1, 1946, and all such materials on hand were shipped to customers by the end of that month. (Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3532-3543.)

10. The plant at which International and previously the Anaconda Lead Products Company had manufactured lead pigments at East Chicago, Indiana, and the only plant at which these materials were ever manufactured by either of those companies, was sold to The Eagle-Picher Com-
649 pany on October 1, 1946. (pp. 3542-3543.)

11. In order for International to resume the pro-

duction of dry white lead or white lead-in-oil, it would be necessary to purchase or construct a plant for that purpose. (p. 3543.)

Reason: International does not own or control any of the machinery, equipment or plant facilities essential for the production of such lead pigments and none of the properties it does own or control could be readily converted to the production of these materials.

12. There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments. (Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3543.)

Reason: There has been no change in the conditions which resulted in International's decision to go out of the business of manufacturing lead pigments nor is any such change reasonably foreseeable. Not only did International sell the only property it had for the manufacture of lead pigments but, with the exception of two individuals,
650 none of the personnel engaged in the production and sale of those materials are still employed by the Company.

13. When the Anaconda Lead Products Company first entered the business of selling dry white lead, which was in 1920, it sold this material f.o.b. East Chicago, Indiana, freight allowed to any point in the United States. (Com. Ex. 826A; p. 3497.)

14. Anaconda Lead Products Company in 1935 adopted the two (2) zone system employed by its competitors for the sale of dry white lead. (Com. Ex. 836-I.)

15. International when it entered the dry white lead business continued to sell by this system whereby the United States was divided into what was known as a par zone and the Pacific Coast zone. (Com. Ex. 836-I; pp. 3497-3498.)

Reason: International, being only a small factor in this business, found it necessary to adapt and conform its sales policy to those of its major competitors. (Com. Ex. 836J; p. 3498.)

16. International sold its dry white lead at the prices established by the market leaders, which it learned of through its customers and prospective customers.

651 Reason: International was a small factor in the dry white lead business. This product could not be

sold for a premium and, the margin of profit being narrow, International generally tried to secure the same price realized by its competitors. (Com. Ex. 836J; p. 3498.)

17. International never sold dry white lead under a consignment agreement. (Com. Ex. 836D-E; pp. 3533-3535.)

18. During the years that International was engaged in the manufacture and sale of dry white lead, namely from 1937 through 1945, its position with relation to the total percent of dry white lead sold annually by the industry ranged from a low of 10.49% to a high of 19.43% in 1937. (Com. Ex. 836J.)

19. In 1931 the Anaconda Lead Products Company commenced the production of white lead-in-oil. (Com. Ex. 836A; p. 3510.)

Reason: Competition in the dry white lead business had become so keen that it was necessary to enter this field in order to provide a sufficient outlet for the dry white lead produced by the Anaconda Lead Products Company so that this operation could be conducted at a profit. (p. 3507.)

652 20. The initial sales policy of the Anaconda Lead Products Company for its white lead-in-oil was simply to secure the most it could for what was a new product that was in competition with well established and nationally known materials. (p. 3511.)

21. A policy was subsequently adopted by the Anaconda Lead Products Company of selling its white lead-in-oil at ½¢ per pound under the price secured by its principal competitors for their products, which policy was followed by International during the time that it produced this material. (p. 3512.)

Reason: The white lead-in-oil manufactured by Anaconda Lead Products Company and later by International was unknown to the trade and could not command the same price. This differential was one that enabled Anaconda Lead Products and later International to secure a maximum amount for its product and still provide sufficient inducement to the trade to buy this material over those of its competitors that were more widely known and more intensely advertised. (p. 3515.)

22. Commencing on or about January 1, 1937, and until it went out of the business, International adopted sub-

stantially the same zone system for the sale of its
653 white lead-in-oil as was used by its principal competitors. The nature of this zone system was determined through contacts with customers and prospective customers. (Com. Ex. 836E; pp. 3515-3517.)

Reason: The major producers of white lead-in-oil were selling on a zone system and it was necessary, in order for International to compete with them, to sell on the same basis. (pp. 3515-3516.)

23. International, in pricing its white lead-in-oil, ascertained through its customers, prospective customers and salesmen the prices at which its competitors were selling this material and generally undersold them by ¼¢ per pound. (pp. 3513-3514.)

Reason: International could not secure the same price for its white lead-in-oil as its competitors could for their well established products. To have sold International's material for more than ¼¢ per pound less than competition would have raised a doubt as to its quality, resulting in a loss of sales and also in a loss of return that would have otherwise been available. (pp. 3513-3515.)

24. International never sold white lead-in-oil by
654 consignment contract except in the State of Wisconsin where this means was adopted to protect it under the state law covering the insolvency of vendors. (Com. Ex. 836D-E; pp. 3533-3537.)

25. International supplied its dealers with price cards containing a suggested resale price for its white lead-in-oil but did not require them to follow these, nor was there any action taken against those dealers who did not follow these suggested prices. (pp. 3536-3537.)

26. During the years that International manufactured and sold white lead-in-oil, namely from 1937 through 1945, its position with relation to the lead-in-oil sold annually by the industry ranged from a low of 3.08% in 1943 to a high of 4.03% in 1940. (Com. Ex. 836H-I.)

27. International's prices within each zone in which it sold dry white lead and white lead-in-oil were uniform for each product to the same class of customers in the same quantity bracket. (Com. Ex. 836C-J.)

28. International never agreed with any of the respondents herein, or any other competitors, to a system of delivered price quotations for the sale of lead pigments. (pp. 3508-3539.)

Reason: There is no evidence in the record of any

655 agreement and there is uncontroverted testimony that International was never a party to such an agreement. (pp. 3508, 3539.)

29. International never was a party to any agreement with any of the respondents herein, or with any other competitor, regarding a plan whereby the United States was divided into zones for the purpose of selling lead pigments. (pp. 3508-3539.)

Reason: There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3508, 3539.)

30. International never used the office of the Lead Industries Association, or its officers, employees and agents of the same, for the purpose of exchanging price factors and information concerning price factors to be used at times by International and any of the respondents herein, or any other competitor, in calculating, determining and announcing price factors to be used at times in selling lead pigments. (pp. 3509, 3539-3540.)

Reason: There is no evidence in the record of any such use of the Lead Industries Association and there
656 is uncontroverted testimony that International was never a party to such use. (pp. 3509, 3539-3540.)

31. International never agreed to adopt or adopted or maintained and used terms and conditions of sale employed in the so-called "consignment" or "agency" agreements under the leadership of respondent, National Lead, for the purpose of preventing dealers from selling white lead and from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such consignment or agency agreements. (pp. 3509, 3540.)

Reason: There is no evidence in the record of any such agreement or negotiations and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509, 3540.)

32. International never agreed with any of the respondents herein, or any other competitor, to fix or fixed and included in offers to sell, the prices, terms and conditions at which said dry white lead was sold or offered in sale for commerce. (pp. 3509-10, 3540-41.)

657 Reason: There is no evidence in the record of any such agreement and there is uncontroverted testimony that International never was a party to any such undertaking. (pp. 3509-10, 3540-3541.)

Conclusions of Law.

1. This proceeding is subject to the provisions of the Administrative Procedure Act.

2. International has not combined or conspired or cooperated with any of the respondents for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sales of lead pigments in commerce.

3. International has not engaged in any unfair, oppressive or discriminatory acts, methods or practices in connection with the sale or offers to sell lead pigments in commerce.

4. International has not discriminated in prices between purchasers of lead pigments of like grade and quality sold for use, consumption or resale within the several states of the United States and the District of Columbia, or has not systematically sold such commodities to any purchasers at a price higher than the price at
658 which commodities of like grade and quality are sold by it to other purchasers and users.

5. None of the material allegations of the amended complaint as to the respondent, International, is supported by any evidence which has been produced at the hearings in this matter.

6. International has not violated and is not violating the provisions of Section 5 of the Federal Trade Commission Act.

7. International has not violated and is not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

8. The Federal Trade Commission should enter an order herein, dismissing the amended complaint as to the respondent, International.

Chadbourne, Wallace, Parke & Whiteside,
By H. E. Gardiner,
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No. 25 Broadway,
Borough of Manhattan,
City of New York 4,
Attorneys for Respondent, International Smelting and Refining Company.

659 BEFORE THE FEDERAL TRADE COMMISSION.

Docket No. 5253.

In the Matter of

National Lead Company, a corporation,
Eagle-Picher Lead Company, a corporation,
Eagle-Picher Sales Company, a corporation,
Anaconda Copper Mining Company, a corporation,
International Smelting & Refining Company, a corporation,
The Sherwin-Williams Company, a corporation, and
The Glidden Company, a corporation.

FINDINGS AND CONCLUSIONS PROPOSED BY THE SHERWIN-WILLIAMS COMPANY.

(Received Dec. 29, 1947.)

660 Comes now, The Sherwin-Williams Company, one of the respondents herein, and moves the Trial Examiner, under Rule XXI of the Commission's Rules of Practice, that he include the proposed findings herein later set forth in the recommended decision he is required to file under Rule XXII of the aforesaid Rules of Practice. The evidentiary facts, and reasons, supporting such findings are set out immediately in conjunction with each finding requested.

661 Requested Findings as to Charges Stated in Count I.

Paragraph One: With respect to the general charge stated in Paragraph One of Count I Sherwin-Williams requests the following finding:

"The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has violated the provisions of Section 5 of the Federal Trade Commission Act."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested.

Paragraph Two: With respect to the charge stated in Paragraph Two of Count I Sherwin-Williams requests the following finding:

> "The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has combined, conspired or cooperated with the other respondents to hinder, lessen or eliminate price competition in the sale of lead pigments or has used unfair, oppressive or discriminatory acts, methods or practices in the sale thereof in interstate commerce."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested but a brief statement of Sherwin-Williams' overall contention is as follows:

1. Sherwin-Williams sets its price on the basis of free delivery at one of its 50 odd shipping points with the customer paying the actual freight therefrom to his own destination except when car load orders are involved. This system is very different from the delivered price system used by other respondents in that it does reflect differences in cost of delivery from Sherwin-Williams' shipping points to the various customer's respective destinations.

2. Sherwin-Williams has not set up a zone system whereby the total cost to its customers is matched with, or at a differential below, the delivered price quoted by any other respondent. Its freight policy, as outlined, precludes such matching. The plan used by Sherwin-Williams is contrary to a zone delivered price system.

3. Sherwin-Williams has not engaged in any unlawful activity with the aid of Lead Industries Association. It has retained its bare membership therein for many years but has not participated in the type
662 of activities sponsored during the N. R. A. Code days since the N. R. A. Code system was held to be illegal. The information it furnishes to, and receives from Lead Industries Association does not concern prices or price factors or terms or conditions of sale.

4. Sherwin-Williams never adopted or used the consignment method of selling white lead.

5. Sherwin-Williams has not exchanged price information with any other respondent and has not agreed with any other respondent relative to prices or terms or conditions of sale for lead pigments.

Paragraph Three: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Three of Count I.

Paragraph Four: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Four of Count I.

Paragraph Five: With respect to the charges stated in Paragraph Five of Count I, Sherwin-Williams requests the following findings:

"Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge, which are manufactured only in its Chicago plant from pig lead obtained in the open market from practically all suppliers. It does not produce the other lead pigments involved. It sells and distributes such products in interstate commerce to various classes of customers but the volume of such sales constitutes a very small and negligible part of the total sales of such products by all producers. It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state. While Sherwin-Williams uses white lead and red lead in the manufacture of some types of paint there is no evidence that its use of such products in the manufacture of paint is pertinent to this proceeding."

The evidentiary facts supporting the foregoing findings are as follows:

Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge (Tr. 1313), which are manufactured only in its Chicago plant (Tr. 1313, Tr. 3746) from pig lead obtained in the open market from practically all suppliers (Tr. 1313). It does not produce the other lead pigments involved (Tr. 1313). In 1943 Sherwin-Williams shipped about

5% of the white lead in oil shipped by the industry and
663 approximately the same percentage for many years prior thereto (Tr. 1331). For many years, its dry white lead and litharge shipments to customers represented less than 1%, respectively, of the total shipments while its dry red lead and red lead in oil shipments to customers were approximately nil (Tr. 1331-1332). Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast (Tr. 1314, Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio (Tr. 2066). It does not sell red lead or litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070), and is not an important factor in the sale of lead pigments, particullarly red lead and litharge (Tr. 1648).

Paragraph Six: With respect to the charges stated in Paragraph Six of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not violated, and is not now violating, the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring or cooperating with any of the other respondents herein for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sale for lead pigments in interstate commerce or by engaging in or continuing unfair, oppressive or discriminatory acts, methods or practices in connection with its sales of lead pigments."

The evidentiary facts supporting the foregoing findings are set forth in detail elsewhere in connection with various requests for specific factual findings.

Paragraph Seven: Sherwin-Williams makes no request for any findings with respect to the charges stated in subparagraph A of Paragraph Seven of Count I.

With respect to the charges stated in subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not combined or conspired with any of the other respondents to do or perform, and has not performed, any of the acts, methods or practices set forth in items 1 through 7 inclusive, of subparagraph B of Paragraph Seven of Count I."

The evidentiary facts, and reasons, supporting the foregoing finding are set out in connection with requests for specific findings relative to items 1 through 7, inclusive.

664 As to items 1 and 2 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

"Sherwin-Williams has not agreed to adopt, and has not adopted or maintained, a system of delivered price quotations which prevents reflection of any difference in the cost of delivery of lead pigments to the respective locations of the purchasers thereof. In arriving at its prices for lead pigments Sherwin-Williams has designated 53 (as of September 1939) major cities located strategically in all sections of the United States as shipping points and has established warehouses and shipping facilities thereat. The price quoted at 21 of such cities which are located east of the Mississippi River and north of Kentucky and Virginia is a base price and the price quoted at each of the other designated cities includes an added differential which varies according to the location of such shipping points relative to Chicago. These differentials are not arbitrary mark-ups but are applied for the purpose of recouping, in whole or in substantial part, the freight cost involved in shipping from Sherwin-Williams' sole lead pigment manufacturing plant at Chicago to its various shipping points. Purchasers generally pay the price applicable at the nearest shipping point plus actual freight therefrom to destination. While Sherwin-Williams' price to customers in cities served by the same shipping point or by shipping points having the same price is the same, purchasers in all of such cities have a different total cost to the extent of the difference in the freight costs from such shipping points to the purchasers' respective destinations. Except on orders from governmental agencies and railroad and marine accounts, Sherwin-Williams' price for less than carload quantities is the same as the purchaser's delivered cost only when the purchaser receives delivery at a shipping point or in the suburbs thereof or in contiguous locations thereto or in one of a very few cities which are accorded F. O. B. prices. Purchasers accepting delivery at or near any of Sherwin-Williams' shipping points obtain a lower delivered cost, but not price, than other purchasers

located farther, freight-wise, from the same shipping point or from any other shipping point having the same applicable price. Sherwin-Williams pays the freight on carload or truck load orders but, due to Sherwin-Williams position in the industry, there are relatively few such orders. Other respondents generally sell on a delivered price basis to all classes of customers in any quantity. To the extent that any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases from such other respondents as sell on a delivered price basis even if there should be any identity of price quotations. Sherwin-Williams has not agreed to adopt and has not adopted or maintained a zoning system whereby price quotations made
665 by it to all purchasers of a class are matched to, or at a set or agreed differential below, the price quotations of any other respondent and differences in location and freight costs from shipping point to destination are disregarded. Sherwin-Williams' policy of charging freight on less than carload orders precludes a matching of its customers total cost with the delivered prices quoted by other respondents except in those cities where Sherwin-Williams maintains a warehouse and no freight cost is incurred and in those very few cities which are quoted on an F. O. B. basis. Further, there is not substantial identity of Sherwin-Williams' prices with the other respondents' prices to customers generally even in those cities or even where carload orders are involved."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

As to Items 1 and 2:

Sherwin-Williams sells less than car or truck load quantities of its lead pigments on a shipping point system (Tr. 1318-1319, Tr. 4105-4106, Tr. 3704, Tr. 3754-3756). It has a number of warehouses in strategically located major cities throughout the United States from which it fills its orders (Tr. 3747, Tr. 3754-3756). In September 1939 there were 53 such shipping points (R. X. 198 A-H, C.X.662 Z21, Tr. 3756). Eight (Spokane and Seattle, Washington; Portland, Oregon; Sacramento, Santa Rosa, Los Angeles and Oakland, California and Phoenix, Ari-

zona) are located in the far West (Tr. 3756, Tr. 3850). Sherwin-Williams' other 45 shipping points were strategically located in major cities east of the Rocky Mountains (5 in Texas; 3 each in Ohio and New York; 2 each in Minnesota, Missouri, Oklahoma, Florida, Tennessee, West Virginia, North Carolina and Pennsylvania; and one each in Colorado, Iowa, Nebraska, Louisiana, Alabama, Georgia, South Carolina, Kentucky, Illinois, Indiana, Michigan, Virginia, Maryland, New Jersey, Connecticut, Rhode Island, Massachusetts and Maine) (R.X. 198 A-H and C.X. 662 Z-21). The warehouse or shipping points in each district are named on the dealer cards used in such district (CX 662W, Tr. 3702). With certain exceptions hereinafter noted Sherwin-Williams ships all less than carload shipments from the shipping point nearest the purchaser on a collect basis or freight is prepaid and added to the invoice (Tr. 3758-3759, Tr. 3836-3838, Tr. 3842, Tr. 3849-3850, Tr. 3855, Tr. 4105-4106). The exceptions are:

(1) On all purchases by federal, state, county and municipal governments and agencies connected therewith, Sherwin-Williams pays the freight to destination because such purchasers will not buy on any basis other than a delivered one (Tr. 3746-3747, Tr. 3841-3842);

(2) On all purchases by railroad or marine accounts Sherwin-Williams pays the freight to the nearest point on the purchaser's line (Tr. 3747, Tr. 3842);

666 (3) On purchases for delivery at any one of its shipping points Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3756, Tr. 3768, Tr. 3776, Tr. 3836-3838);

(4) On purchases for delivery in Washington, D. C., Gadsden, Alabama, Pensacola, Florida, San Diego, California, Chattanooga, Tennessee or Salem, Oregon, Sherwin-Williams, under authority of its general office, pays the freight from shipping point to such destination (Tr. 3757-3758, Tr. 3852-3855, C.X. 782 F), but such cities are not classified as shipping points for other cities (Tr. 3759);

(5) On purchases for delivery to a suburb of or a contiguous location to, one of its shipping points or one of the six cities specified in item 4, Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3768-3769, Tr. 3836-3838), and

(6) Less than carload shipments in the eight far Western states appear to be handled differently from those elsewhere. Commission's Exhibit 782 D indicates that there

are several cities in each of these states in addition to those previously identified as being shipping points or as being within the free delivery area thereof to which deliveries may be made on an F.O.B. basis but there is no indication that they also serve as shipping points. Eight are in Montana, three each are in Washington and Idaho, two each are in Arizona and Utah, one is in Nevada and there are several in California (C.X. 782 D). A number of those in California are obviously within the respective free delivery areas of the Oakland and Los Angeles warehouses. Sherwin-Williams appears to have made flat price increases over the San Francisco price (C.X. 782 D). Apparently no other respondent has a similar system in effect on the West Coast.

In rare cases the shipment may not actually go from the nearest shipping point because of lack of stock (Tr. 3759, Tr. 3699-3700). In such cases the freight is adjusted and equalized between the points involved with the customer paying the difference (Tr. 3760, Tr. 3838-3840), but never more than if the shipment came from his normal shipping point (Tr. 3767-3768, Tr. 3839), since the location of the shipping points prevents this happening (Tr. 3768). Such equalization is not predicated upon any competitive situation (Tr. 3700). In a few instances, as an occasional accommodation to dealer customers with respect to special rush orders, Sherwin-Williams makes deliveries to such customers from stores which are not classified as shipping points and which do not carry warehouse stocks. The tabulation of 845 invoices (C. X. 794) reveals 44 instances of deliveries made from stores which were not shipping points. Fifteen shipments were made by the Salt Lake City & Ogden, Utah stores; fifteen by nine different stores in Texas of which twelve were local deliveries and fourteen by eight other stores of which eight were local deliveries. Local deliveries accounted for one-half of the total (C. X. 794, R.X. 205). If the customer is located in the same city as the store, there is no charge for such delivery
667 but if the customer is located in some other city then the shipment is made on a collect basis (Tr. 3844-3845, Tr. 3769).

The Commission prepared and introduced into evidence as C. X. 794 A-Z8 a tabulation of information taken from 845 white lead (dry and in oil in containers of 100 pounds or less) invoices, during three separate three month periods, from all (C. X. 793, Tr. 887) of Sherwin-Williams'

ten district offices to various destinations which, together with the time periods, were selected by the Commission's investigator (Tr. 887-891). The investigator who made this tabulation testified "we found that it was necessary to request that all invoices or house copies showing the sale and shipment of white lead be taken from the files of the divisional offices and sent to us as the white lead sales of the Sherwin-Williams Company were very insignificant as far as their total sales of other merchandise was concerned." (Tr. 836). Invoices covering shipments of white lead from all district offices during the three separate periods were submitted and examined (Tr. 887-889). Apparently the invoices not tabulated involved only small quantities of one to five pounds of white lead (Tr. 889). This tabulation did not show who actually paid the freight on the shipments (Tr. 894) so Sherwin-Williams prepared and introduced into evidence a tabulation (R. X. 205 A-X) which shows all information on the same invoices (except 12 which were missing) relative to identifying the method of shipment so far as payment of freight is concerned (Tr. 3771). This tabulation was also supplemented by uncontradicted testimony based both upon a physical examination of the original invoices during the hearing and upon the witnesses' knowledge of Sherwin-Williams' freight and shipping point policies. The examination of invoices was directed particularly to those which did not affirmatively show that the order was to be shipped collect or show the tonnage of the entire order was sufficient for a car or truck load, or the relative location of destination to shipping point (Tr. 3771-3804; Tr. 3836-3856, Tr. 4113). Thirty-three invoices involved governmental orders; 10 involved railroad or marine account orders; 336 (40% of total tabulated) involved deliveries in cities where Sherwin-Williams maintained warehouses; 8 involved deliveries in the six cities which were treated as F.O.B. points; 100 involved deliveries in suburbs or contiguous locations to cities in which Sherwin-Williams maintained warehouses; 4 involved freight equalizations arising through shipment from warehouses other than the one nearest to the customer and 213 invoices involved payment of freight by the respective customers (R.X. 205). In addition there was testimony to the effect that in connection with 16 invoices Sherwin-Williams policy as to charging freight on less than carload shipments was waived because of competitive necessity (Tr. 4104-4113). Excluding the invoices

which involved deliveries within a city where Sherwin-Williams maintained a warehouse or in a suburb or contiguous area thereof more than 50% of the invoices involved payment of freight from shipping point by the purchasers thereof (R.X. 205 A-X).

668 When a customer's order amounts to a carload or truck load then Sherwin-Williams ships from its factory in Chicago and pays the freight (Tr. 3707-3709, Tr. 3746, Tr. 3756, Tr. 3840-3841), even though it may not be able to ship the entire order at one time (Tr. 4114). An examination of the 90 invoices wherein Sherwin-Williams paid the freight to destination because the order involved a carload order shows that the total amou[illegible]f white lead involved in the entire 90 carloads was 225,241 pounds (113 tons) which is equal to between six and seven actual carloads. The largest amount in any one invoice was 4,050 pounds. What actually happened in these 90 instances is that the purchaser ordered a carload of paint products from Sherwin-Williams and the lead pigments included in the order amounted to a relatively small proportion thereof. For the convenience of the examiner in checking the accuracy of the foregoing statement we submit herewith as "Exhibit A" a tabulation of the invoices covering shipments where Sherwin-Williams paid the freight to destination because a carload order was involved which gives the invoice number and the total amount of white lead billed. Another tabulation has been prepared from the information shown on C.X. 794 A-Z8 to demonstrate the fact that Sherwin-Williams' participation in the lead business is largely restricted to small orders. Of the 845 invoices tabulated only 78 involved orders for 1000 to 2000 pounds of lead; only 52 involved orders for from 2000 pounds to 4000 pounds; only 11 involved orders for from 4000 pounds to 6000 pounds; only 6 involved orders for from 6000 pounds to 10,000 pounds and only 11 involved orders for as much as 5 tons and only 3 of these were for more than 5 tons (one for 15,000 pounds, one for 20,000 pounds, and one for 25,000 pounds). The facts as to the orders involving as much as 5 tons are as follows: one was a local delivery to a governmental agency from the St. Louis warehouse; one was a delivery from the Newark, New Jersey warehouse to the Bronx in New York City, which involved a free delivery area as part of metropolitan New York; three were shipments from the Oakland, California warehouse free alongside steamer dock in San Francisco; one

involved a shipment from the plant in Chicago to the United States Government at Fort Douglas, Utah; one involved a shipment from Chicago to a painting contractor in New Orleans, Louisiana and four involved local deliveries from the plant in Chicago to a governmental agency in Chicago. The tabulation has been designated as "Exhibit B". These two tabulations establish that in three separate three month periods selected by the Commission's staff, Sherwin-Williams (1) shipped only 113 tons of white lead in 100 pound or smaller containers which was delivered without a freight charge because it formed part of carload orders including paint products, and (2) shipped only eleven orders for as much as 5 tons of white lead in such containers.

The Commission contends that Sherwin-Williams' bulletins such as C.X. 662 C-D and C.X. 662 S-T serve the same purpose as a zone system but actually such bulletins
669 serve an entirely different purpose for Sherwin-Williams than C.X. 659 C-P (list of delivery, equalization and differential points) served for National before it adopted a zone system, Sherwin-Williams' bulletins were applicable only to the 226 cities in which it had retail stores while National used its list of more than 1000 cities as a guide in pricing its products to its customers generally. Since prior to 1924 (Tr. 1312, 1316-1317) Sherwin-Williams has circulated to its district sales staff and representatives in its own branch stores its General Trade Sales Bulletins (C.X. 594 A-B, C.X. 662 C-D, C.X. 662 G-H and C.X. 662 S-T) for the sole purpose of advising them as to the price differentials in effect on the date thereof "For Sherwin-Williams' warehouses and stores" (Tr. 3697). The same list is used for white lead in oil, dry white lead, dry red lead, red lead in oil and litharge (Tr. 1318). Such bulletins serve no purpose for quoting prices or making billings to any customers (Tr. 3697). Sherwin-Williams' roster of retail stores as of June 1, 1943 shows that Sherwin-Williams had 270 retail stores located in 245 different cities of the United States (C.X. 652 A-K). The Trade Sales Bulletin bearing the nearest date (May 21, 1942) lists the same cities but does not include those on the Pacific Coast (C.X. 594 A-B, C.X. 662 S-T). The roster of retail stores includes ten cities not shown on the bulletin but the roster is almost a full year later in date. Apparently, these ten cities are ones where no stores were operated by Sherwin-Williams in May 1942 but were in June 1943 (See C.X.

652 D, Emporia, Kansas is one of the ten). Stores were increasing in number as there were 322 on October 1, 1944 (C.X. 776). The bulletin includes eleven cities not listed on the roster. Five of them (Boston, Charleston, Minneapolis, Philadelphia and Sioux City) were warehouse points and were not classified as retail stores (C.X. 654). One is an obvious mistake in printing. (Danbury, Illinois is listed on bulletin and Danbury, Connecticut is listed on roster.) Apparently the other five (Fargo, Indianapolis, (which was a shipping point in 1939, R.X. 198 A), New York, Shreveport and Sioux Falls) represent stores closed between May 21, 1942 and June 1, 1943. A comparison of cities named on the roster of stores and warehouses (C.X. 652 A-K, C.X. 654) with those named on the bulletin (C.X. 594 A-B, C.X. 662 C-D, C.X. 662 S-T) supports Sherwin-Williams contention that such bulletins serve no purpose other than as above stated. These exhibits do not constitute a list of Sherwin-Williams shipping points (Tr. 3713-3714, Tr. 3846). Less than carload shipments to customers located in the cities listed on C.X. 662 S-T which are not shipping points are made on a freight collect basis from shipping point (Tr. 3850).

On December 30, 1932, National Lead began its system of selling white lead in oil through agents as well as through dealers and in the fall of 1933 expanded the system to cover all of the United States except the Pacific Coast (R.X. 158, C.X. 685, C.X. 706 D, C.X. 506 D-F). In 1933 Eagle-Picher began selling white lead in oil in the same manner (C.X. 712 A, C.X. 626-628). Glidden later adopted the consignment method for selling white lead in oil 670 (C.X. 649 A-C, C.X. 650 A-C). Apparently all abandoned the system later. Sherwin-Williams has never used the agency or consignment method of selling white lead in oil (Tr. 3701). A comparison of National's prices and Sherwin-Williams' prices for white lead in oil discloses substantial differences in the prices charged to those who purchased such products for resale. National's price announcements for this period are shown on respondent's Exhibit 158 and Sherwin-Williams' prices for the same period are shown on Commission's Exhibits 662 Z5 through 662 Z26. In January 1937 Sherwin-Williams' quotation to dealers in any quantity was 9½¢ per pound but National's quotation ranged from 11½¢ per pound for less than 500 pounds to 10½¢ per pound for 1000 pounds. In March 1937 Sherwin-Williams' quotation to dealers in any quantity

was $9.80 per 100 pounds but National's quotation ranged from 12½¢ per pound to 11¾¢ per pound for 1000 pounds. In September 1937 Sherwin-Williams' quotation to dealers in any quantity was $9.75 per 100 pounds but National's quotation was $11.00 per 100 pounds. In all subsequent quotations both National and Sherwin-Williams quoted dealers only one price for any quantity and Sherwin-Williams' quotations were more than 1¢ per pound lower than National's. (October 1937, January 1938, March 1938, September 1938, February 1939, September 1939, April 1941 and January 1942). National's charge against its agents was always lower than its price to dealers (R.K. 158). Sherwin-Williams' dealers compete with both National's dealers and agents. Sherwin-Williams' lower quotation is offset to varying amounts since National's quotations are for delivery at the purchaser's destination and Sherwin-Williams' quotations are for delivery at a shipping point and the purchaser must pay the freight therefrom on less than carload orders. The result, therefore, is that the delivered price to a customer of National's and the delivered cost to a customer of Sherwin-Williams' varies with each transaction depending not only on the difference in prices but also on the amount of freight paid by Sherwin-Williams' customers. The delivered cost to Sherwin-Williams' dealers might even be higher than National's delivered price to its dealers. There is no satisfactory way to compare Sherwin-Williams' prices to its dealers and their delivered costs with the charges made by National against its agents because the two classes function so differently. Sherwin-Williams' dealers have to bear additional costs and assume additional risks which National's agents did not have to assume. (C.X. 613) The same relation existed as between Sherwin-Williams' dealer customers and the agents of Glidden (C.X. 650) and Eagle-Picher (C.X. 626-C.X. 631 F).

As to items 3 and 4 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

"There is no evidence that Sherwin-Williams sought or secured, or agreed with any of the other respon-
671 dents to seek or secure, from Lead Industries Association, its officers, employees or agents any advice, assistance or cooperation in fixing, adopting, publishing or using non-competitive terms and conditions for the sale of lead pigments or that any representatives

of Lead Industries Association ever participated in any discussions concerning prices, price factors or terms and conditions of sale with Sherwin-Williams or any of its representatives subsequent to the meetings held during the Code days in 1933 and 1934. There is no evidence that the Association was ever used in any way by Sherwin-Williams to exchange price factors or information concerning such factors or that Sherwin-Williams ever furnished any of its prices or any price information to any other respondent or ever received any such information from such sources or that its prices and terms and conditions of sale of lead pigments in interstate commerce are not competitive."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Lead Industries Association was organized in 1928 as an unincorporated association (Tr. 996-997) and during the period involved its membership included more than fifty miners, smelters and refiners of lead and manufacturers of various lead products, including manufacturers of lead pigments (C.X. 498 A-K) (Tr. 997). Sherwin-Williams has been a member of the Association since its inception (C.X. 498 A-K, Tr. 1010) but has never been represented on its Board of Directors or Executive Committee. (Tr. 1011, C.X. 499 A-H). The White Lead in Oil and Dry Products Committees of the Association first became active in the summer of 1933 as a result of a meeting of the Lead Pigments Division on July 20, 1933, where there was discussion as to suitable trade practices to be included in the Supplemental Code (N.R.A.) (C.X. 506 C, C.X. 508 D, C.X. 799, Tr. 997). Sherwin-Williams was not represented at this meeting but was represented at subsequent meetings (C.X. 500 A, C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A, Tr. 1330). Discussions of trade practices at these meetings were for the purpose of formulating acceptable rules for a supplementary code under N.R.A. (C.X. 508 D, also minutes of all meetings of two Committees). The activities of these Committees ceased in 1935 after the decision of the Supreme Court in the Schechter case (Tr. 998). The white lead group became active in the late 1930's in some promotional work to stimulate the use of white lead. (Tr. 998). Sherwin-Williams was not represented on this Committee (C.X. 500-B) and

there is no evidence that Sherwin-Williams' representative in the Association ever took any part in any activity of this Committee or of the Association subsequent to May, 1935 (Tr. 1330). When the White Lead in Oil and Dry Products Committees were considering the provisions which would be submitted to the N.R.A. for inclusion
672 in a supplemental code for the industry, there was discussion and tentative action as to price filing provisions and as to standard terms and conditions for the sale of lead oxides (red lead and litharge) and dry white lead. (C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A.) The Deputy Administrator of N.R.A. suggested a substitute price filing section (C.X. 518 A-B) which was Section 2 of Article VII and which was not approved by the industry. A less restrictive section was adopted and submitted to N.R.A. (C.X. 803). The Code, approved May 24, 1934 (C.X. 809), contained the price filing provision proposed by the industry (Art. VII, Sec. 2). A three month extension for beginning the enforcement of Art. VII, Sec. 2 and of Schedule "A" was requested and obtained (C.X. 507 C) and a further extension was requested in September 1934 (C.X. 507 A-M). There is no evidence they ever became effective. Sherwin-Williams has never filed any prices or price information in conformity with said Art. VII of the Code during Code days or thereafter (Tr. 2187-2188) and there is no evidence that it ever put Schedule "A" into effect in the sale of its lead oxides or dry white lead.

For many years some of the manufacturers of lead pigments have filed with Lead Industries Association monthly reports showing volume of sales, production and stocks on hand, but prices were never reported to the Association (Tr. 1083, Tr. 1330, C.X. 836 J). The report from the Association to the members did not in any case show individual shipments, production, or stocks on hand, and it merely gave an overall total combined figure for each respective category (Tr. 1330-1331, C.X. 670, C.X. 856 J). It did not issue any publication to the trade setting forth purported current market quotations on lead pigments (Tr. 1039), and it did not furnish information or quotations on lead pigments to any trade publication (Tr. 1040). Even though Sherwin-Williams can determine its own position, percentagewise, in the industry (Tr. 1331) by using such reports, there is no evidence that such reports furnished Sherwin-

Williams with information which it could use unlawfully in calculating, determining and announcing its quotations.

There is no evidence in the record that C.X. 525, which is a carbon copy of a letter under date of December 14, 1933, from Harold Rowe of National Lead Company addressed to Sherwin-Williams Company of Canada at 897 Centre Street, Montreal, Canada, was ever brought to the attention of the respondent, Sherwin-Williams Company; that the addressee of such letter was owned, controlled or dominated in any way by Sherwin-Williams Company; that the addressee had any relationship with National Lead Company other than that of a purchaser or that the letter involved any illegal exchange of information.

673 As to item 5 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not adopt or use the agency or consignment method of selling white lead and did not conform to the terms and conditions used by such other respondents as did adopt and use such method."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

The agency or consignment plan of selling white lead in oil was adopted by National in January 1933 (C.X. 685, C.X. 706-D, C.X. 506 D-F). About the same time Eagle-Picher adopted the plan (C.X. 712 A, C.X. 626, C.X. 627, C.X. 628). This plan was discussed at the meetings of the White Lead in Oil Committee held on August 9, 1933 (C.X. 501 A-D) and on October 28, 1933 (C.X. 505 A-B). On November 15, 1933, National put the plan into effect in all its branches, except the Pacific Coast Branch (C.X. 598, Tr. 1091). Eagle-Picher did likewise. (C.X. 629 A-C, C.X. 704.) Sherwin-Williams was opposed to the plan and openly so stated at the time (C.X. 506-E, C.X. 712 A), and never adopted or used the agency or consignment plan of selling (Tr. 3701).

As to item 6 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not agreed with any of the other respondents to fix and include in its offers to sell lead pigments common prices, terms or conditions of sale for such products."

The evidentiary facts, and reasons, supporting such finding are set out in detail elsewhere herein in connection with requests for specific findings.

As to item 7 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not not participate in or have any knowledge of any contracts or agreements between National Lead Company and DuPont."

In support of the foregoing finding it is merely necessary to state that there is no testimony or other evidence connecting Sherwin-Williams with any knowledge of, or participation in, the relations and contracts between National Lead and DuPont, nor is there any evidence from which any such inference can be drawn.

674 Paragraph Eight: With respect to the charges stated in Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "In quoting and selling lead pigments in less than carload lots Sherwin-Williams has not divided the entire country into geographical zones whereby it quotes the same delivered cost to all buyers of the same class without regard to the location of such buyers or of the transportation costs involved."

The evidentiary facts, and reasons, supporting such finding are set out in connection with other specific finding requested as to each subparagraph.

As to subparagraph A of Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not quote or sell lead pigments in steel kegs of 100 pounds or less upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted immediately following subparagraph A of Paragraph Eight of Count I and does not follow the pricing formula therein set forth."

The evidentiary facts and reasons supporting the foregoing finding are as follows:

The map included as part of subparagraph A of Paragraph Eight alleges that each respondent charges a premium of $.75 per 100 pounds over its base prices in Arizona, Utah, Idaho and Montana; a premium of $.25 per 100 pounds over its base price in California and the western

one-half (approximately) of Oregon and Washington and a premium of $.50 per 100 pounds over its base price in Nevada and the eastern one-half of Washington and Oregon (See map). The only price information from Sherwin-Williams' South Pacific Coast (Los Angeles) area is shown on Commission's Exhibits 785-790, inclusive, and 794 EFG. Sherwin-Williams' freight policy applies to the Pacific Coast as well as elsewhere (C.X. 785-790). Commission's Exhibits 785-786 and 790 are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Commission's Exhibits 787 and 788 were put into effect on April 26, 1941, and remained in effect until January 26, 1942 (C.X. 789). At the same time Sherwin-Williams' General Trade Sales Bulletin No. 177 (C.X. 662 MN) was in effect in all areas but the Pacific Coast. A comparison of C.X. 787 and 788 with Commission's Exhibits 662 MN shows that the prices quoted for the various products do not conform at all to the formula charged. The base price for white lead in oil in 100 pounds kegs to dealers was $10.00 on C.X. 662 MN. Adding the differential of $.25 per 100 pounds charged in the Complaint would result in a California price of $10.25 to a dealer. However, the
675 lowest Los Angeles price was actually $11.75 (orders for less than 500 pounds in 100 pound kegs). In Commission's Exhibits 662 MN the prices quoted for white lead in oil, dry white lead, red lead in oil, dry red lead and litharge vary greatly (at dealer level dry white lead is $9.25 per 100 pounds, dry red lead is $10.25 per 100 pounds and red lead in oil is $11.00 per 100 pounds), but in Commission's Exhibits 787 and 788 all lead pigments, with the exception of red lead in oil which is $1.00 per 100 pounds higher, were offered at the same price. A comparison between Commission's Exhibits 789 and 662 OP reveals the same situation. The Complaint charges that Arizona carries a differential of $.75 per 100 pounds over the base price (See map Paragraph Eight). Actually, Sherwin-Williams' price in Phoenix, Arizona is $.50 per 100 pounds over its actual price in Los Angeles, which is more than $.25 higher than its base price. Its price is still higher in other Arizona cities due to freight costs to purchasers on less than carload shipments from Phoenix (C.X. 787 and 788). Further, a comparison of C.X. 794-G (tabulation of Sherwin-Williams' invoices from the Los Angeles district

in the last three months of 1941) with C.X. 787 and 788 which were then in effect in that area, shows that of the 43 different listings, 34 conformed thereto exactly, 5 conformed to the price quoted for different classifications or for different amounts than actually shipped (Phx. 495, L.A. 13214, L.A. 7262, L.A. 12928 and L.A. 9573) and only 4 failed to conform (L.A. 10859(2), L.A. 7687 and 8653). Even these 4 did not conform to the formula charged in the Complaint.

Sherwin-Williams' price bulletins for Sherwin-Williams' Central Pacific Coast (Oakland) district are Commission's Exhibits 784 BDF, but, with the exception of C.X. 784 D which was in effect in the last three months of 1941, are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Sherwin-Williams' General Trade Sales Bulletin of April 25, 1941 (C.X. 662 MN) was in effect during the same period except on the Pacific Coast. A comparison of these exhibits show that the prices quoted by the Oakland office of Sherwin-Williams for the various products do not conform to the formula charged. Dry white lead, white lead in oil, dry red lead and litharge carried the same price while red lead in oil was $1.00 per 100 pounds higher (C.X. 784 B, D. F). This price identity for such products did not exist in the East (C.X. 662MN). The dealer price for white lead in oil on C.X. 784 D was $11.50 per 100 pounds for less than 500 pounds and on C.X. 662 MN it was $10.00 per 100 pounds and the prices to painters and to retail purchasers, though different, were the same in both areas. A comaprison of C.X. 794 K, L, M and N (tabulation of Sherwin-Williams' invoices from the Oakland district) in so far as they reflect shipments for the last three months in 1941 with the prices quoted in that area during that period (C.X. 784 D) shows that of the 71 different listing 38 conformed exactly, 8 conformed to the prices quoted for other classifications or different amounts,

18 were the result of bids (where quoted prices are not
676 generally followed) and only 7 failed to conform. Further, the prices quoted in the Los Angeles district and in the San Francisco district were not the same, San Francisco being uniformly $.25 per 100 pounds lower according to bulletins in effect at the same time (C.X. 784D and C.X. 787). The price information from Sherwin-Williams' Portland, Oregon district does not furnish an entirely clear

picture of its pricing policy but does supply sufficient information to establish that its policy does not conform to the formula charged (C.X. 781 A-C and C.X. 662 OP). All lead pigments, except red lead in oil, carried the same price (C.X. 781 A-C) but this price identity did not exist in the East, litharge to dealers being $9.75 per 100 pounds and dry red lead $10.75 per 100 pounds and dry white lead and white lead in oil also varying (C.X. 662 O). Red lead in oil was $1.25 per 100 pounds more than white lead in oil in the East (C.X. 662 O) but only $1.00 more in the Portland area (C.X. 781 A-C). The entire price range for sales to dealers in the Portland district (C.X. 781 A-C) was more than $.25 and $.50 greater than the price range in effect in the East at the same time (C.X. 662-OP). This differential does not agree with the one charged. The offices at Los Angeles and Oakland, California and Portland, Oregon serve at least the eight far western states (C.X. 782 D). In 1941 Sherwin-Williams sold only 318 tons of white lead in oil on the Pacific Coast, some of which was purchased by Sherwin-Williams there from W. P. Fuller Company and from Premier Paint nad Color Works and a substantial portion was shipped from Sherwin-Williams' Chicago plant in mixed carload lots with paint. In the forty states east of the Rocky Mountains, Sherwin-Williams had 45 shipping points. (R.X. 198 A-H, C.X. 622 Z21). There are none in eleven states. (New Mexico, Wyoming, North Dakota, South Dakota, Kansas, Arkansas, Wisconsin, Mississippi, Delaware, Vermont and New Hampshire) The result is that in those eleven states there are no cities wherein Sherwin-Williams has any delivered price. Of course, governmental agencies and purchasers, if any, buying in carload quantities obtain delivered prices but all other purchasers in these states must pay the freight from shipping point to destination. Unquestionably some cities in one of these states will be served by one shipping point and others by another and the two shipping points may have different prices. In the other 29 states the customers located in the 45 shipping point cities or in areas contiguous thereto obtain delivered prices but purchasers in all other cities pay freight on less than carload orders. It is obvious, therefore, that the total cost to each purchaser from Sherwin-Williams varies (1) as to the price in effect at the shipping point which services the account, and (2) as to his relative distance, freightwise, from such

shipping point. The price may be the same to two different customers yet they may have very different total costs due to differences in freight paid. The charge that Sherwin-Williams quotes on a delivered price basis according to the zones described in Paragraph Eight of Count I cannot be sustained.

677 As to subparagraph B of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

> "The record establishes that Sherwin-Williams has not engaged in the practice charged in so far as quotations and sales of less than car or truck load orders are concerned and there is no evidence that it has sold carload or truck load lots of dry white lead in barrels on the basis charged. Sherwin-Williams' sale of dry white lead, irrespective of type of container, are negligible."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Sherwin-Williams does not manufacture or sell lead sulphate (Tr. 1313). So far as Sherwin-Williams' practices in selling dry white lead in barrels and bags are concerned the record shows only that on January 28, 1942, Sherwin-Williams quoted this product on the Pacific Coast at a differential of $.25 per 100 pounds over its quotation throughout the rest of the country (C.X. 823 G); that this "Pacific Coast" area included all of the states west of the Rocky Mountains (Tr. 1325); that on February 5, 1943, it issued a quotation to the Federal Government for this product in lots of less than 20 tons (less than car lot) without any indication that such quotation involved any differential (C.X. 782 C), and that the relative position of Sherwin-Williams in shipments of dry white lead (irrespective of size or type of container) to customers in 1943 and for a considerable period prior thereto amounted to "practically nothing—less than one per cent" (Tr. 1331-1332). Sherwin-Williams' policy of requiring purchasers to pay freight on all less than carload orders from its nearest shipping point to destination applies to this product (Tr. 3746) and there is no evidence that any sales were made to customers whose less than carload purchases would fall within the recognized minor exceptions. The reasons why Sherwin-Williams' freight policy cannot result in the same delivered cost, as distinguished from price, to cus-

tomers differently located, freightwise, from the shipping point have been set out in detail previously in support of findings requested under Paragraph Seven of Count I. Also, it has been shown that when any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located customers of such other respondents as sell on a delivered price basis. There is no evidence that Sherwin-Williams ever used the differential shown in C.X. 823 G in any previous or subsequent bulletin.

As to subparagraphs C and D of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

"In quoting and selling dry red lead and litharge in barrels in less than carload lots Sherwin-Williams has
678 not quoted or sold said products to customers within the geographical areas described at the delivered cost alleged. In quoting dry red lead and litharge in barrels in carload lots of 20 tons or more it has not quoted such products at differentials over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received. Sherwin-Williams' sales of such products, irrespective of type or size of container, are negligible."

The evidentiary facts and reasons supporting the foregoing findings are as follows:

Sherwin-Williams produces dry red lead and litharge only in Chicago, Illinois (Tr. 1313) and its relative position in shipments of these products (irrespective of type of containers) to customers in 1943, and for many years prior thereto, ranged from less than 1% for litharge to "practically nil" for dry red lead (Tr. 1332). It does not sell either of these products on the Pacific Coast (Tr. 1314, Tr. 1324, Tr. 2066), which includes all of the states west of the Rocky Mountains (Tr. 1325) and is not an important factor in the sale thereof elsewhere (Tr. 1648). For at least twenty years Sherwin-Williams has not manufactured red lead or litharge for use by the battery manufacturing industry (4070) and is not a competitor in that field (Tr. 1648) which was an increasingly important one prior to war time restrictions (Tr. 1640, Tr. 4093). While Sherwin-Williams sells oxides in carload lots (Tr. 1327), there is no evidence in the record that Sherwin-Williams has made carload shipments of red lead or litharge, other

than shipments to its own plants, to any point which carries a differential above its own base price (Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio (Tr. 2066).

The only evidence in the record relative to Sherwin-Williams' practices in selling red lead and litharge in barrels or bags on either a carload or less than carload basis is C.X. 823 A-F and C.X. 782 C and the stipulation at pages 2065-2066 of the record. Sherwin-Williams' policy of requiring purchasers to pay freight on less than carload orders from its nearest shipping point to destination applies to these products (Tr. 3746). The reasons why Sherwin-Williams' freight policy as to less than carload orders cannot result in the same delivered cost, as distinguished from price, to customers differently located freightwise from a shipping point have been previously discussed. Also, it has been demonstrated previously that when any purchaser from Sherwin-William pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located csutomers of such other respondents as sell on a delivered price basis. There is no evidence that any sales were made to customers whose less than carload purchases would fall within the minor exceptions to Sherwin-Williams' policy of requiring
679 the purchaser to pay the freight from Sherwin-Williams' nearest shipping point to destination on all less than carload shipments.

There is uncontradicted evidence that Sherwin-Williams does not sell oxides on set differentials over the American Smelting and Refining Company's price of common pig lead at New York as alleged (Tr. 1328), but quotes its price therefor on a differential over the New York market quotation for pig lead (Tr. 1328). There is no evidence that Sherwin-Williams did not use this system before 1933. Sherwin-Williams has produced 95%, 97% and 98% red lead since 1932 at least (Tr. 3870), and in the past few years has quoted 97% at 25¢ per 100 pounds over the price of 95% and has quoted 98% at 50¢ per 100 pounds over the price of 95% (C.X. 823 F, C.X. 782 C, Tr. 2065). There is no evidence that Sherwin-Williams adopted the policy of quoting these three grades at different prices prior to January 14, 1942 (C.X. 823 F) and there is no evidence it was done then as a result of any agreement or understand-

ing with any other respondent. The sole difference between the three grades is the extent to which oxidation has been completed (Tr. 3870) and this is accomplished by a longer burning for the two higher grades. (Tr. 3871, Tr. 3877-3878). Sherwin-Williams made studies as to the relative length of time required to burn the different grades (Tr. 3871) then ascertained the comparable production costs (R.X. 209) without regard to overhead burden (Tr. 3874-3882). It was found that the respective differentials quoted by Sherwin-Williams for 97% and 98% red lead were less in each case than the additional cost of producing such grades over the cost of producing 95% red lead (R.X. 209, Tr. 3881).

Paragraph Nine: With respect to the charges stated in subparagraph A of Paragraph Nine of Count I Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not require its customers to resell lead products at prices and terms of sale fixed, determined and published by it and does not control and is not responsible for price levels to consumers or painters except to the extent that consumers and painters purchase their requirements of such products direct from Sherwin-Williams either through its general office or through its retail stores."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

In accordance with the policy set by Sherwin-Williams' officials, it has been, and is, the regular practice of Sherwin-Williams in making retail sales of white lead, through and at its own stores (270 in United States on June 1, 1943—C.X. 652 A-L) (321 on October 1, 1944—C.X. 776 A-L), to quote and charge the published delivered prices which were applicable at each such destination (Tr. 680 869-870) as exemplified by C.X. 662 S-T. There is no evidence that Sherwin-Williams ever adopted or used any so-called "Fair Trade Contracts" or took any action to control the resale price of any lead pigment to painters or consumers except in retail stores which it owned and operated. Bulletins such as C.X. 594 A-B, C.X. 662 C-D, C.X. 662 G-H and C.X. 662 S-T, do not contain consumer prices and they are furnished only to Sherwin-Williams' district sales staff and to representatives in its own branches (retail stores owned by Sherwin-Williams) and serve no other purpose (Tr. 3697). Bulletins of the type

exemplified by C.X. 662 K-L obviously are not circulated to dealers or others outside Sherwin-Williams' organization because they show prices to dealers and also prices to various classes of customers sold directly by Sherwin-Williams. It never adopted or used the agency plan of selling (Tr. 3701). Sherwin-Williams does furnish to dealers price announcements (Tr. 3696) which suggest to such dealers certain resale prices for white lead in oil (C.X. 662 W-Z26), but not for any other lead pigments and there is no evidence that such dealers felt under any compulsion to, or did, follow such suggestion in reselling or that Sherwin-Williams possessed, or exercised, any power to enforce such suggestions or policed its dealers.

With respect to the charges stated in subparagraph B of Paragraph Nine of Count I Sherwin-Williams requests the following finding:

> "The record contains no evidence that Sherwin-Williams' price differentials, based on the size of containers, were instituted or maintained as a result of any agreement or understanding with any other respondent."

The evidentiary facts, and reasons, supporting the foregoing finding are as follows:

On December 28, 1936 Sherwin-Williams announced that white lead in oil in 50 pound kegs would cost one fourth a cent per pound more than in 100 pound kegs, in 25 pound kegs would cost one-half a cent per pound more and in 12½ pound pails would cost three-fourths a cent per pound more (C.X. 662 E). The price list issued to the trade on January 4, 1937, confirmed this price structure (C.X. 662 Z5). From at least as early as January 6, 1933, which was prior to the meetings held to formulate a code, until January 4, 1937, Sherwin-Williams maintained the same structure except that there was no differential between 50 pound and 25 pound containers. (C.X. 662 W-Z3).

Sherwin-Williams made an analysis of its 1938, 1940 and 1943 contracts for white lead in oil containers and ascertained the actual cost of 100 containers and covers in each of the sizes involved, i.e., 100's, 50's, 25's and 12½'s.
681 The container cost per 100 pounds of material was then computed. The cost of one container for 100 pounds of material was less than the cost of a sufficient number of the smaller size containers for 100 pounds of

material. In only two instances was the differential charged greater than the difference in actual container cost alone and in these two instances the cost was only three cents less than the differential (R.X. 210, Tr. 3882-3885). This cost analysis is also applicable to containers for red lead in oil as they are the same (Tr. 4112). In addition, filling and finishing costs increase as the size of the container decreases (Tr. 3885-3886). The N.R.A. Code contained no provision relative to this subject (C.X. 809). At one meeting there was some discussion as to a differential over barrel prices for 100 pound, 50 pound and 25 pound containers on government, railroad and industrial sales only but no decision appears to have been reached and the differentials discussed were not the ones actually used by Sherwin-Williams from 1933 to 1937 (C.X. 800C).

With respect to the charges stated in subparagraph C of Paragraph Nine of Count I, Sherwin-Williams requests the following findings:

> "So far as requirements contracts are concerned the record shows only that for many years Sherwin-Williams has entered into contracts with purchasers of dry white lead covering quarterly requirements and that Sherwin-Williams does not enter into contracts covering quarterly requirements of dry red lead or litharge. The record contains no published quotations by Sherwin-Williams for dry white lead under such contracts and there is no evidence as to how its price was determined or as to what the terms or conditions of such contracts were. There is no evidence that the quotations of A.S.&R. Co. were used by Sherwin-Williams as a basis for its prices or that the terms and conditions of its contracts were in any way similar to those of the other respondents."

In view of the character of the finding requested it is necessary to refer only to page 1326 of the record. The affirmative portion of the finding is there supported.

With respect to the charges stated in subparagraph D of Paragraph Nine of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not issue cards or lists of the types charged which show delivered quotations to various classes of customers and which include the quotations which such purchasers must make in re-

selling such products to consumers or others. Sherwin-Williams does not issue any price cards which provide a formula whereby all prospective customers
682 at any given destination are presented with price quotations which are matched to, or at a set differential below, the price of other respondents for the same quantities, in the same containers, to the same classes of customers."

The evidentiary facts, and reasons, supporting the foregoing finding have been set out in detail in connection with the supporting facts and reasons urged under Items 1 and 2 of Paragraph Seven, under subparagraph A of Paragraph Eight and under subparagraphs A and B of Paragraph Nine. Briefly summarized they are:

1. Sherwin-Williams sells on a basis of shipping points from which the purchaser pays freight to destination.

2. Sherwin-Williams does not sell lead pigments in containers of 100 lb. capacity or less throughout the United States on a zone basis without regard to freight costs.

3. Sherwin-Williams does not have agents and does not use "Fair Trade" contracts with dealers so is unable to, and does not, control the prices obtained in sales by such dealers.

4. Sherwin-Williams has explained and justified its reason for certain differentials as to container sizes.

5. Sherwin-Williams does control the resale price obtained in transactions taking place in the retail stores it operates but not elsewhere.

6. Sherwin-Williams places only one type of price card in the hands of its dealers and the prices therein shown are merely "suggested" and no action is threatened or taken to secure adherence thereto.

7. The shipping point system used by Sherwin-Williams cannot result in the same total cost to Sherwin-Williams' customers as that for similarly situated customers of such respondents as quote and sell on a delivered price basis.

Sherwin-Williams issues to dealers in its products price announcements which show its prices for white lead in oil to such dealers and which also contain suggested resale prices therefor to consumers and to painters. (Tr. 3696,

Tr. 3700-3701, C.X. 662 W-Z26). These lists show the F.O.B. prices applicable at the several shipping points listed. When deliveries are to be made to destinations other than such shipping points the price quoted is F.O.B. the shipping point and the purchaser pays the freight therefrom to destination. There is no evidence that Sherwin-Williams places any other type of price announcement in the hands of dealers or makes any suggestions (other than as to white lead in oil) to such dealers relative to their resale price to consumers, painters or any other purchasers.

683 Paragraph Ten: With respect to the charges stated in Paragraph Ten of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not use the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of Count I for the purpose or with the effect of enabling it to match exactly its offers to sell lead pigments with the offers of the other respondents herein. Sherwin-Williams does not quote lead pigments on a delivered cost basis. It delivers carload orders and orders by governmental agencies free of delivery cost and also delivers orders where the destination is one of Sherwin-Williams' fifty odd shipping points or a contiguous location thereto or one of the few cities accorded an F.O.B. policy free of delivery costs, but, in general, its customers who are located away from the shipping point by which they are serviced must pay the freight from such shipping point to destination. Sherwin-Williams does not systematically discriminate against purchasers located near its various shipping points in favor of customers located, freightwise, at a considerable distance therefrom."

The evidentiary facts and reasons supporting the findings requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof and are incorporated herein by reference.

Paragraph Eleven: With respect to the charges stated in Paragraph Eleven of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams has not adopted, used or maintained the zone delivered system of pricing described

in subparagraph A of Paragraph Eight of Count I. The system adopted, used and maintained by Sherwin-Williams in selling lead pigments does not have the effects alleged in subparagraphs A, B and C of Paragraph Eleven. Sherwin-Williams has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by other respondents. The various respondents have different delivery costs in shipping lead pigments to their respective csutomers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin-Williams have a freight advantage. In that portion of the United States closer to Chicago, freightwise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an
684 equal footing freightwise. Since Sherwin-Williams' only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage."

Some of the evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof. Other evidentiary facts, and reasons, supporting the findings requested are as follows:

National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for Commission as the "normal period" from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 35% of the dry white lead and 50% of the red lead and litharge (C.X. 578, C.X. 664, Tr. 1647, Tr. 1665-1666). Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California (Tr. 1071-1072). It produces red lead and litharge in plants located in Brooklyn, New York; Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia and Los Angeles and San Francisco, California (Tr. 1625). For the period from

1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead (Tr. 1560-1561). Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey (Tr. 1552, Tr. 1564). In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead (Tr. 1307-1308). It produces red lead and litharge at Hammond, Indiana, which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania (Tr. 1230-1233). In the period from 1937-1943 International Smelting & Refining Company sold from 3% to 4% of the white lead in oil and from 10% to 19% of the dry white lead (C.X. 741, C.X. 822-J). These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Company discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead.

Sherwin-Williams prepared and introduced in evidence as R.X. 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of carload and less than carload railroad freight rates in effect on January 15, 1941 (Tr. 3721-3732). An examination of this exhibit clearly shows that Na-
685 tional Lead's Oakland, Saint Louis and Philadelphia plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant in Scranton, Pennsylvania has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin-Williams all have the same freight advantage in an area surrounding Chicago. The

net result is that Glidden has a freight advantage in some territory, Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin-Williams has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin-Williams' sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil), was introduced as R.X. 200 (Tr. 3732-3740). The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin-Williams all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago over St. Louis, Missouri; Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin-Williams has only six shipping points (Detroit, Indianapolis, Minneapolis, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (either white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin-Williams is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin-Williams in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin-Williams' plant at Chicago. In those instances where Sherwin-Williams ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents.

686 Paragraph Twelve: With respect to the charges stated in Paragraph Twelve of Count I, Sherwin-Williams requests the following finding:

"Sherwin-Williams has not engaged in any unlawful combinations, agreements or understandings with any of the other respondents and its acts, practices, pricing methods, systems, devices and policies in selling lead pigments are not unfair and prejudicial to the public interest; do not deprive the public of the benefit of competition; do not discriminate against buyers or users of lead pigments and lead paint; do not have a dangerous tendency and capacity to restrain commerce in said products and have not actually hindered, frustrated, suppressed or eliminated competition in such products in commerce. Sherwin-Williams has not engaged in unfair acts or practices or unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs One through Eleven, inclusive.

All evidentiary facts and reasons relied upon in Paragraphs One through Twelve, inclusive, as supporting specific requested findings are also relied upon, without specific reference, as support for all other findings requested. By setting forth such evidentiary facts and reasons specifically in connection with one requested finding, it is not intended to waive reliance upon such facts and reasons to the extent they support any other requested findings.

Count II.

Paragraph One: With respect to the charges stated in Paragraph One of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams has not violated the provisions of Section 2(A) of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Othen Purposes", as amended by an Act of Congress, approved June 19, 1936, commonly known as the 'Robinson-Patman Act'."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

Paragraph Two: With respect to the charges stated in Paragraph Two of Count II, Sherwin-Williams requests the following finding:

687 "Sherwin-Williams has not and is not now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce."

The evidentiary facts, and reasons, supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

Paragraphs Three to Five, inclusive: With respect to the charges stated in Paragraphs Three to Five, inclusive, of Count II, Sherwin-Williams requests the same findings as it has heretofore requested in connection with Paragraphs Three to Five, inclusive, of Count I and relies upon the same evidentiary facts and supporting reasons therefor as previously set out in connection with its said requested findings.

Paragraph Six: With respect to the charges stated in Paragraph Six of Count II, Sherwin-Williams requests the following finding:

"In its sale of lead pigments in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act, Sherwin-Williams has not been since June 19, 1936, and is not now, discriminating in price between purchasers of lead pigments of like grade and quality by systematically selling such lead pigments to many purchasers at a price higher than the price at which it sells the same products, or products of like grade and quality, to other competitively engaged customers."

The evidentiary facts and reasons supporting the foregoing requested finding are as follows:

The only testimony in the record from purchasers of lead pigments relative to the competitive effect upon their respective business operations of the pricing practices of the various respondents is that of battery manufacturers located in St. Louis, Missouri; Chicago, Illinois; Kansas City, Missouri; Nashville, Tennessee; Birmingham, Ala-

bama; and Dallas, Texas, who buy red lead and litharge, and that of certain paint manufacturers located in St. Louis, Missouri who primarily buy dry white lead but also buy small amounts of dry red lead. Each of the battery manufacturers who was called as a witness named his own suppliers for red lead and litharge and none of them named Sherwin-Williams (Tr. 1672-2018). Sherwin-Williams does not sell red lead and litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070) and, consequently, the testimony of battery manufacturers as to any pricing practices of suppliers to their industry forms no criterion as to what the effect of Sherwin-Williams' pricing practices may be in those industries to which it does sell
688 red lead and litharge. Similarly, the paint manufacturers who were called as witnesses identified their respective sources of supply and none of them named Sherwin-Williams as a supplier (Tr. 1338-1478). Sales of lead pigments to paint manufacturers are generally made on a contract basis. The record affirmatively shows that Sherwin-Williams did not have any white lead, litharge or red lead contracts in St. Louis during the specific periods concerning which Counsel for the Commission inquired (Tr. 1320). There is no evidence in the record that Sherwin-Williams sold lead pigments to any of the competitors named by the paint manufacturer witnesses. In fact, there is no evidence identifying a single sale by Sherwin-Williams of white lead (dry and in oil) in containers larger than 100 pound kegs or of red lead (dry and in oil) or litharge in containers of any size to any specific purchaser or class of purchasers. Obviously, Sherwin-Williams has sold such products in interstate commerce but there is not a scintilla of evidence to the effect that such products have been sold to any specified class of customers, particularly paint manufacturers. Even if sales at different prices are established there must be a showing that the respective purchasers are in the same general line of business and operate in the same trade area. This has not been done. There must also be evidence that price difference was great enough to have a competitive effect for there to be a discrimination. No attempt was made to produce such evidence except as to battery and paint manufacturers where the products being bought are used by the purchasers in manufacturing their own end products. An amount which might cause that result in that one in-

dustry might not cause it in another. No analogy can be drawn without some comparative basis. Sherwin-Williams has the smallest volume of sales of lead pigments of any respondent so its sales practices could hardly harm any of its competitors. Sherwin-Williams sells primarily to those who use lead pigments in maintenance of their plants and equipment such as railroads, steamship lines, industrial concerns and governmental agencies. The respective lines of commerce of these users can hardly be said to be adversely affected to any appreciable, much less substantial, extent by Sherwin-Williams pricing practices no matter what they might be. At any event such result cannot be inferred from a complete lack of testimony relative thereto. Sherwin-Williams also sells to dealers for resale and to contracting painters for use in doing painting jobs under contract. There is no evidence that Sherwin-Williams has sold to purchasers in either class at a discriminatory price over its price to others who are competitive with such purchasers. In view of this state of the record, how can any inference be made or conclusion drawn as to what competitive effect may be produced by Sherwin-Williams' selling practices? Certainly no inference can be made that there has been a discrimination in price between purchasers competitively engaged when there has been no showing whatever as to what types of purchasers buy white lead (dry and in oil) in containers larger than 100 pound kegs, red lead (dry and in oil) and litharge from Sherwin-Williams. In so far as sales of lead pigments in containers of 100 pounds or less is concerned, there
689 is no evidence that the purchasers to whom Sherwin-Williams sells such products at different prices are competitors. This cannot be assumed from the record. The contrary should be assumed because all purchasers serviced by the same shipping point are quoted the same price. The location of the shipping points reveals that each of them serves a substantial territory. There is no evidence that the sale of lead pigments in containers of 100 pounds or less by dealers who purchase from Sherwin-Williams covers any substantial territory or overlaps the territory of any other dealer purchasing such products at a different price.

Paragraph Seven: With respect to the charges stated in Paragraph Seven of Count II, Sherwin-Williams requests the following finding:

"The record establishes that Sherwin-Williams has

not engaged in the practice charged in so far as quotations and sales of less than carload orders are concerned. In connection with the sale of lead pigments in containers of 100 pounds or less capacity, Sherwin-Williams has not divided the entire territory of the Continental United States into the geographical zones alleged in Paragraph Eight of Count I and in the map appearing immediately in conjunction therewith for pricing purposes. While Sherwin-Williams sometimes uses a zone system (but not a delivered price system except for carload orders) for quoting such lead pigments as it does sell in containers of more than 100 pounds capacity, the record contains no evidence of any sales of such products in such containers to any customers located in any territories which carry an added differential or at varying prices to customers who are in competition with each other."

The evidentiary facts and reasons supporting the finding requested are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and in Paragraph Six under Count II and are incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Eight: With respect to the charges stated in Paragraph Eight of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams does not quote prices in its offers to sell in interstate commerce and does not sell in interstate commerce on a basis where the delivered cost on a specified quantity of lead pigments to any one of its customers located at or near its shipping point amounts to as much as the delivered cost on the same quantity of lead pigments to other customers located farther, freightwise, from the same shipping
690 point, except in those few instances where carload shipments are involved and Sherwin-Williams pays the freight irrespective of the location of the purchaser and in transactions with governmental agencies. Sherwin-Williams' carload shipments of lead pigments are negligible but occasionally relatively small amounts of lead pigments are shipped in connection with carload orders of paint products on which Sherwin-Williams pays the freight irrespective of

the customers' location. Transactions with governmental agencies are not subject to restrictions of the Clayton Act, as amended by the Robinson-Patman Act."

The evidentiary facts, and reasons, supporting the foregoing finding requested are set forth fully in connection with the finding requested in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Nine: With respect to the charges stated in Paragraph Nine of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams does not effect sales in less than carload lots in accordance with the zone delivered pricing method and practice described in Paragraph Eight of Count I and buyers from it do not pay in accordance with quotations of delivered costs matched with delivered prices quoted by other respondents. Sherwin-Williams does not discriminate in price in favor of more distantly located customers who are competitive with customers more closely located to its shipping points."

The evidentiary facts, and reasons, supporting the finding requsted are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Ten: With respect to the charges stated in Paragraph Ten of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams does not make sales on less than carload orders to customers on the basis of a zone delivered pricing method and practice. Consequently, it does not make sales in such quantities to customers located at or near borders of adjoining or contiguous zones. There is no evidence that any of Sherwin-Williams' customers who are competitive with other of its customers pay prices different from the prices paid to Sherwin-Williams by such competitive customers."

691 The evidentiary facts and reasons supporting the foregoing finding requested are set forth in connection with the finding requested in Paragraph Six hereof under Count II and in connection with the findings requested in Paragraphs Seven, Eight and Nine hereof under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Eleven: With respect to the charges stated in Paragraph Eleven of Count II, Sherwin-Williams requests the following finding:

> "In connection with the sale of lead pigments in commerce, Sherwin-Williams does not charge, demand, accept or receive higher prices from any of its customers than from other competitively engaged customers. There is no evidence that dealer customers of Sherwin-Williams serviced by shipping points having a different price applicable thereat are engaged in competition with each other."

The evidentiary facts, and reasons, supporting the foregoing requested finding are as follows:

Since December 28, 1936, Sherwin-Williams has had only one class of dealers and has made no distinction between any of its dealer customers except such distinction as may arise by reason of dealers being serviced by shipping points having different prices applicable thereat (C.X. 662 E-F, C.X. 662 I-R, C.X. 662 U-V). There is no evidence that such dealers as may pay different prices are in competition with each other. Sherwin-Williams has classified certain customers who purchase for use rather than resale into the following classifications:

(1) Contracting painters and large maintenance accounts sold direct;

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry);

(3) Railroad and marine accounts;

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W.P.A. accounts, and

(5) Small consumers.

Obviously, the members of these classifications are not competitive in any way with the members of any other classification or with dealers. They use lead pigments pur-

chased from Sherwin-Williams in maintenance of their plants and properties and not for resale either in the same form or as a substantial component of another product. Sherwin-Williams' stores are billed by it on the same basis as its dealers and such stores resell at the consumer prices set by Sherwin-Williams (Tr. 3709).

692 Paragraph Twelve: With respect to the charges stated in Paragraph Twelve of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not match its offer to sell lead pigments in commerce to prospective dealer purchasers at all, or any substantial number of, destinations at, or at a fixed differential below, the offers of other respondents."

The evidentiary facts, and reasons, supporting the requested finding are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Thirteen: With respect to the charges stated in Paragraph Thirteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices followed by Sherwin-Williams have not had the effects alleged in subparagraphs A, B, and C of Paragraph Thirteen."

The evidentiary facts, and reasons, supporting the requested findings are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight, Nine and Eleven under Count I and in Paragraph Six under Count II and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

Paragraph Fourteen: With respect to the charges stated in Paragraph Fourteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices of Sherwin-Williams as disclosed in the record do not constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act."

All evidentiary facts, and reasons, relied upon in Paragraphs One through Twelve, inclusive, under Count I and

all evidentiary facts and reasons relied upon in Paragraphs One through Thirteen, inclusive, under Count II as supporting specific requested findings are relied upon without specific reference as support for the finding hereinabove requested.

693 Conclusions of Law.

Sherwin-Williams requests that the Examiner incorporate in his recommended decision the following conclusions of law:

1. Sales made by Sherwin-Williams at and through its several hundred retail stores located throughout the United States are intra-state transactions and are not subject to the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act.

2. Sales made by Sherwin-Williams to purchasers who do not buy for resale and who are not competitive with each other do not come within the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

3. The acts of Sherwin-Williams in connection with the preparation of the Lead Code and in connection with its operation prior to the invalidation of the National Recovery Act by the decision of the Supreme Court in the Schecter case cannot be made the basis of a charge of conspiracy to restrain trade in violation of Section 5 of the Federal Trade Commission Act.

4. The term "price" as used in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, means "the sum paid by the purchaser to the seller for the products purchased."

5. Varying mill net returns from sales where customers paid the same price to Sherwin-Williams for the products purchased do not constitute price discriminations within the prohibitions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Mere difference in price is not a discrimination in price within the meaning of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.

6. Sherwin-Williams has not violated and is not now violating the provisions of Section 5 of the Federal Trade Commission Act.

7. Sherwin-Williams has not violated and is not now violating the provisions of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.

8. This proceeding is not in the public interest.

9. As a matter of law the Federal Trade Commission should enter an order dismissing the Amended Complaint as to the respondent Sherwin-Williams.

Respectfully submitted this 29th day of December, 1947.

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Dec. 29, 1947.

694 "Exhibit A".

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds Total White Lead Billed
205–A	794–C	4297	1035	
		4298	175	1210
205–C	794–E	11409	200	
		9741	400	
		14433	471	
		9068	100	1171
205–D	794–F	11415	348	
		13314	75	423
205–E	794–G	7262	1200	
		10859	156	
		495	400	1756
205–F	794–I	4111	400	
		23535	1000	
		25900	14½	
		25899	700	
		25898	15	
		25897	650	

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds Total White Lead Billed
		4625	150	
		4649	60	
		44312	500	
		16380	350	
		16376	500	
		17498	24	
		8908	2500	
		11574	4125	
		11645	862½	
		11605	4237½	
		35109	28	16,118
205–G	794–J–I	9555	60	
		14939	2400	
		14936	575	
		14938	50	
		37153	700	
		38336	200	
		15516	2400	
		15517	1200	7585
205–L	794–P	14435	783	
		1674	1626½	
		17085	942	
		17302	1340	
		17332	450	
		15672	3156	
		15501	1125	
		14294	2300	
		3830	730	
		1090	1540	13,963
695, 205–M	794–Q	1138	500	
		4326	779½	
		11604	2000	
		12182	3690	
		7968	1300	
		25588	100	
		26344	210	8,580
205–N	794–R	17151	400	400
205–O	794–T	17481	500	500
205–P	794–U	7962	1800	
		4955	825	2,625

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Pounds Total White Lead Billed
205–R	794–Y	13244	832	
		7325	1000	
		11232	612½	
		13026	48	
		1577	500	
		611	875	
		6786	1000	
		8373	4800	
		4708	150	
		8525	175	
		9445	850	
		7200	3025	13,868
205–S	794–Z	59529	630	
		59565	2500	3,130
205–U	794–Z–2	58983	525	
		4108	291	816
205–V	794–Z–4	14588	1100	
		4220	2000	
		14857	1050	4,150
205–W	794–Z–5	11188	300	
		11755	200	
		12346	700	
		49923	510	
		3326	2700	
		11417	1860	
		11199	2935	
		11386	2000	11,205
205–X	794–Z–6&7	12875	4050	
		14719	1592	
		11300	900	
		49575	2500	
		14622	1175	
		841	924	12,641
		10894	1500	
			Grand Total	225,241

696 "Exhibit B".

White Lead Shipments by Sherwin-Williams in Commission's Exhibit 794 A-Z8 Which Involved More Than 1000 Pounds Each.

Comm. Ex. No.	1000# to 2000#	2000# to 4000#	4000# to 6000#	6000# to 10,000#	10,000# and over
794 C	3	1			1
794 D	2				
794 E		2		1	
794 F	3		1		
794 G	1				
794 I	10	6	2		1
794 J	2	2			
794 K		2			
794 M	8	2		2	3
794 N	8	12	3	1	
794 P	10	4	1	2	1
794 Q	2	2			
794 R	1	1			
794 T	2	1			
794 U	2				
794 Y	7	3	2		
794 Z	2	6			5
794 Z1	3	1			
794 Z2	4	2	1		
794 Z4	3	1			
794 Z5	2	3			
794 Z6-7	3	1	1		
	78	52	11	6	11

697. BEFORE FEDERAL TRADE COMMISSION.

(Caption—5253)

PROPOSED FINDINGS AND CONCLUSIONS.

Comes now the attorney in support of the complaint and files this his proposed findings and conclusions, said proposed findings and conclusions being filed at this time pursuant to ruling of the Trial Examiner that additional proposals as to findings and conclusions may be filed with the Examiner or with the Commission:

I. Products, Parties, Trade and Commerce.

A. Products.

The products involved in this proceeding are known in the trade and by the respondents themselves as "lead pigments" and as used herein such term is defined to include all of the various oxides, carbonates and sulphates of lead described hereinafter with more particularity whether or not such products are used as pigments.

1. Basic carbonate white lead.

Basic carbonate white lead in dry form is a fine white powder used extensively as a pigment in paints and protective coverings as well as in the manufacture of ceramics, putty, and other products. It has a chemical formula of approximately $2PbCO_3$. $Pb(OH)_2$. The original commercial process of manufacture is known as the Old Dutch process, wherein buckles of metallic lead are immersed in earthenware pots containing acetic acid and stored in a stack between layers of tanbark for from 100 to 120 days. The reaction of the acetic acid on the metallic lead forms basic carbonate, which is screened and ground into a fine white powder. (RX 156) The Old Dutch process is no longer conducted on any considerable scale, having been largely replaced by the Carter process wherein molten lead is atomized and exposed to sprays of acetic acid, water and carbon dioxide gas in a slowly revolving drum. In the Carter process corroding time is reduced to approximately ten days. (RX 156) Basic carbonate was produced by the International Smelting & Refining Company

and is presently produced by the Eagle-Picher Company in Chicago through a process of electrolysis.

Dry white lead is sold for the most part to paint and ceramic manufacturers for use by them as a raw material in further manufacturing processes and as so sold is customarily packaged in 600 pound containers.

698 2. Basic sulphate white lead.

Basic sulphate white lead is a white pigment similar to basic carbonate white lead which may be produced either by processing metallic lead or by fuming lead concentrates without reducing the basic raw material to metallic lead. It is marketed in bags of 50 pounds or steel containers of from 425 to 625 pounds and used extensively in the manufacture of mixed paint.

3. White lead-in-oil.

White lead-in-oil is the term customarily used to refer to basic carbonate white lead mixed with linseed oil to form a heavy paste. It is sold to dealers for resale to painters and members of the general public and its principal ultimate use is as a paint, after mixture with additional oil, mineral spirits and dryers. White lead-in-oil when so mixed is now and has for many years been known in the trade and by consumers as a protective covering of the finest quality for houses and other wooden structures. Both white lead-in-oil and mixed paints containing white lead as a pigment are generally regarded by painters and consumers as being superior to preparations containing other pigments.

4. Litharge.

Litharge is a sub-oxide of lead, having the approximate chemical formula PbO, which is produced by heating metallic lead in the presence of air in a furnace. There are many different grades and types of litharges, depending upon the use for which they are manufactured. Litharge is used in the manufacture of paint and varnish, in the "sweetening" of gasoline by the petroleum refining industry, and in the production of agricultural insecticides. The largest use of litharge is in the manufacture of electric storage batteries where it is the basic raw material for both negative and positive battery plates. The litharges sold by the respondents to the battery manufacturing

industry are sometimes referred to in the trade and by the respondents as oxides of lead. Litharge is customarily sold to industrial consumers in containers of 600 pounds.

5. Red Lead.

Red lead, having the approximate chemical formula Pb_3O_4, is produced by a further heating and oxidation of litharge and is manufactured in several grades and qualities depending upon the extent to which the roasting and refining processes are carried. (RX 156) Red lead is now and has for many years been regarded as the finest pigment for metal protective paint, and is used to a large extent as a pigment in the paint manufacturing industry. It is also used extensively in the manufacture of electric storage batteries, in producing agricultural insecticides, and in petroleum refining.

699 Red lead is also mixed with linseed oil to form a paste known as red lead-in-oil, sold largely to dealers for resale to painters and consumers for use directly as a paint upon addition of oils and dryers.

6. Miscellaneous pigments.

A number of other miscellaneous products are likewise known to the industry as lead pigments, including blue lead, a form of basic sulphate of lead produced by the fuming of lead concentrates; orange mineral, a pigment produced by further processing red lead or basic carbonate white lead; and grinders' lead-in-oil which is basic carbonate white lead mixed with linseed oil to form a paste of thinner consistency than white lead-in-oil and ordinarily sold to the paint manufacturing industry.

7. Pig lead.

Pig lead is the term used to describe metallic lead which is customarily marketed in the form of pigs or bars containing approximately 90 pounds each. Lead is mined extensively in the United States, the principal part of domestic production being produced in Idaho, Montana, Colorado, Utah, and Arizona.

Lead is also mined extensively in what is known as the tri-state area, comprising the territory in the southwest corner of Missouri and contiguous areas in Oklahoma and Kansas; and in Southeastern Missouri and southern Illinois.

Pig lead is the basic raw material from which lead pigments are manufactured, except that some basic sulphates and litharges are produced from fuming lead concentrates. Except as to respondent Anaconda, whose supplies of lead were derived from its own smelters and refineries (CX 836C), all of the respondents purchase the major part of their requirements of lead on the open market. Respondent Eagle-Picher has produced as much as 66⅔% and as little as 10 or 15% of its own requirements of lead in the period from 1930 to date. (Tr. 1569-70.)

B. Parties.

1. National Lead Company.

National Lead Company is a New Jersey corporation with its principal offices at 111 Broadway, New York, New York, and is sometimes hereinafter referred to as National. National presently operates factories producing lead pigments as follows:

Brooklyn, N. Y.	White Lead
	Red Lead
	Litharge
Perth Amboy, N.J.	White Lead
Philadelphia, Penna.	White Lead
	Red Lead
	Litharge
Charleston, W. Va.	Red Lead
	Litharge
Atlanta, Ga.	Red Lead
	Litharge
Chicago, Ill.	White Lead
	Red Lead
	Litharge
St. Louis, Mo.	White Lead
	Red Lead
	Litharge
San Francisco, Calif.	White Lead
	Red Lead
	Litharge
Los Angeles, Calif.	Red Lead
	Litharge
Dallas, Texas	Red Lead
	Litharge

National is by far the largest producer and seller of lead pigments in the United States, accounting for between 60 and 63% of the shipments of white lead-in-oil from 1939 to 1942; about 50% of the dry white lead and about 50% of the red lead and litharge. In addition to its business in the lead pigments, National is a very large producer of titanium pigments, and is also a producer of linseed oil and of many different products composed principally of lead.

National was organized in December, 1891, and acquired the physical properties of the following concerns immediately after its organization:

Cornell Lead Company, Buffalo, N. Y.
The National Lead and Oil Company, New York, N. Y.
Atlantic White Lead & Linseed Oil Company, New York, N. Y.
Salem Lead Company, Salem, Mass.
The J. H. Morley Lead Company, Cleveland, Ohio.
The Eckstein White Lead Company, Cincinnati, Ohio.
Anchor White Lead Company, Cincinnati, Ohio.
Maryland White Lead Company, Baltimore, Md.
American White Lead Company, Louisville, Ky.
Kentucky Lead and Oil Company, Louisville, Ky.
Southern White Lead Company, Chicago, Ill.
D. B. Shipman White Lead Works, Chicago, Ill.
Southern White Lead Company, St. Louis, Mo.
St. Louis Lead and Oil Company, St. Louis, Mo.
Collier White Lead and Oil Company, St. Louis, Mo.
Red Seal Castor Oil Company, St. Louis, Mo.
(CX 3-B and C).

701 In addition National acquired at the same time controlling stock interests in the following concerns:

St. Louis & Zacatecas Ore Company.
St. Louis Smelting & Refining Company.
Western White Lead Company.
John T. Lewis & Bros. Company.
Beymer Bauman Lead Company.
Fahnestock White Lead Company.
Pennsylvania White Lead Company.
Armstrong-McKelvy Lead & Oil Company.
Davis-Chambers Lead Company.
The American Oxide Company.
Union White Lead Manufacturing Company.
Brooklyn White Lead Company.
Bradley White Lead Company.

Lenox Smelting Company.
Jewett White Lead Company.
Ulster Lead Company.
Rio Grande Smelting Company.
(CX 3-D).

During 1902 National began negotiating with Messrs. Thomas Fortune Ryan, Daniel Guggenheim, and H. H. Rogers, looking to the purchase of the properties and businesses of the following concerns:

Hoyt Metal Company, St. Louis, Mo.
Chadwick-Boston Lead Company, Boston, Mass.
Tatham & Bros., New York, N. Y., and Philadelphia, Pa.
Gibson & Price Mfg. Co., Cleveland, Ohio.
James Robertson Mfg. Co., Baltimore, Md.
Raymond Lead Co., Chicago, Ill.
E. W. Blatchford Mfg. Co., Chicago, Ill.
Lawrence Shot Lead Company, Omaha, Neb.
Markle Bros., E. St. Louis, Ill.
American Shot & Lead Company, New York, N. Y., Cincinnati, Ohio, St. Louis, Mo.
Kahn Bros. & Co., New York, N. Y.
Thomas W. Spark, Philadelphia, Penna.
Ronalds, Johnson & Co., Brooklyn, N. Y.
L. M. Rumsey Mfg. Co., St. Louis, Mo.
N. O. Nelson, St. Louis, Mo.
W. J. Matheson & Co., Ltd., New York, N. Y.
Wetherill & Bro., Philadelphia, Penna.
N. Z. Graves & Co., Philadelphia, Penna.
McDougall White Lead Co., Buffalo, N. Y.
Sterling White Lead Co., Pittsburgh, Pa.
The Davis Lead Co., Pittsburgh, Pa.
Gebhart White Lead Co., Dayton, Ohio.
The Eagle White Lead Co., Cincinnati, Ohio.
Carter White Lead Company, Chicago, Ill., and Omaha, Neb.
Hammar Bros. White Lead Company, St. Louis, Mo.
Union Lead & Oil Company, Brooklyn, N. Y.
(CX 5-B and C.)

702 Those negotiations do not appear to have been completed, and in June, 1903, the following companies were acquired by the United Lead Company, organized by a syndicate which had a controlling interest in American Smelting & Refining Co. (CX 22P):

American Shot & Lead Company.

Gibson & Price Mfg. Co.
McDougall White Lead Co.
White Metal Company.
Markle Lead Works.
Union Lead & Oil Company.
Gebhart White Lead Co.
James Robertson Mfg. Co.
E. W. Blatchford Mfg. Co.
Tatham & Bros.
Raymond Lead Co.
Chadwick-Boston Lead Company.

Efforts by the promotors of the transaction to acquire Picher Lead Company, Bender & Aldred, and the Carter White Lead Company were not successful. (CX 22P)

In February, 1906, National acquired the securities of United Lead Company and control of the constituent concerns listed above (CX 9A). In March, 1906, National acquired the Carter White Lead Company, with properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company (Answer of National). The properties of Evans Lead Company, producing red lead and litharge in Charleston, W. Va., were acquired in 1935; the properties of Wetherill & Bros., producing lead pigments in Philadelphia, Penna., were acquired in the early '30's. In 1931 National sought to acquire the assets and properties of respondent Eagle-Picher which is the successor to the interests of the Picher Lead Company, The Eagle White Lead Company, and Hammer White Lead Company mentioned above. An offer to purchase the assets of respondent Eagle-Picher was made by National in June, 1931, but was not accepted by that company (CX 866). During 1930 and for two years thereafter, National acquired capital stock in respondent Eagle-Picher through purchases by E. J. Cornish, Chairman of the Board of National, in his own name. Such acquisitions of stock occurred during the period from 1932 to 1935, and at one time some 50,000 shares were owned by Mr. Cornish, such shares being held by him for the benefit of National (RX 183). There is evidence that Cornish and F. M. Carter, then president of National, were seeking to secure for National a controlling stock interest in respondent Eagle-Picher during the period of such stock acquisitions and as late as 1935 (CX 527, 528).

2. The Eagle-Picher Company and The Eagle-Picher Sales Company.

The Eagle-Picher Company and The Eagle-Picher Sales Company, described in the amended complaint as Eagle-Picher Lead Company and Eagle-Picher Sales Company, are Ohio and Delaware corporations, respectively, with principal offices at 901 Temple Bar Building, Cincin-
703 nati, Ohio. The Eagle-Picher Company, sometimes hereinafter referred to simply as Eagle-Picher, is engaged in mining, smelting, refining and sale of metallic lead, metallic lead products, lead pigments, and other articles of commerce. The Eagle-Picher Sales Company is a wholly owned and controlled subsidiary of Eagle-Picher and its acts have been for the benefit and in behalf of Eagle-Picher and will be treated hereinafter for the purpose of these findings as the acts of Eagle-Picher.

Eagle-Picher maintains factories producing basic carbonate white lead, both dry and in oil, at Chicago, Illinois (the factory formerly operated by International Smelting & Refining Company and acquired by Eagle-Picher in 1946) and at Cincinnati, Ohio. Factories producing red lead and litharge are operated at Joplin, Missouri, and Newark, New Jersey. Basic sulphate white lead is produced at Galena, Kansas, and Joplin, Missouri. Eagle-Picher is engaged in the mining of lead ores in the tristate field (a geographical area comprising the contiguous sections of southwest Missouri, Kansas and Oklahoma) and operates plants reducing such ores to concentrates and metallic lead in and around Joplin, Missouri. Eagle-Picher is the second largest producer of lead pigments, and accounted for from 15 to 20 per cent of white lead in oil and from 8 to 12 per cent of dry basic carbonate shipments during the period from 1930 to 1946 (Tr. 1560).

Eagle-Picher's former position in the industry is increased by the acquisition of the producing facilities of respondent International Smelting & Refining Company, and its percentage of dry white and white lead-in-oil, with the addition of the shipments accounted for by International in 1942, is enlarged to from 18.5 to 23.5 per cent of white lead-in-oil and to from 22 to 26 per cent of dry basic carbonate (CX 836 H, I, J). In shipments of oxides, Eagle-Picher is also in second position in the industry, after National.

In addition to its production of white leads, red lead and litharge, Eagle-Picher is a producer of lithopone and a large producer and seller of zinc oxide and leaded zinc pigments, consisting of a combination of basic sulphate white lead and zinc oxide.

3. Anaconda Copper Mining Company and subsidiaries.

Anaconda Copper Mining Company is a Montana corporation with principal office at 25 Broadway, New York, New York, and is sometimes hereinafter referred to simply as Anaconda. Respondent International Smelting & Refining Company is a Montana corporation with principal offices at 25 Broadway, New York, New York, and is sometimes hereinafter referred to simply as International.

Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper, lead and zinc. Prior to 1936 dry white lead and white lead-in-oil were produced by Anaconda Lead Products
704 Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, a wholly owned and controlled Anaconda subsidiary. In 1936 the assets and properties of the Anaconda Lead Products Company were acquired by International and the former company dissolved in the latter part of 1936 after having been engaged in the production and sale of white lead since 1920. From 1936 to the fall of 1946 lead pigments produced by International were sold and distributed by that company or by Anaconda Sales Company, the division of business between the two depending upon the states in which business was done. (CX 836; Tr. 3497)

The principal officers of International and Anaconda are the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Co. were in fact operating divisions of respondent Anaconda, having no substantial identity of their own. (Tr. 3549-52) It is concluded that the acts of respondent International, of Anaconda Lead Products Company, and of Anaconda Sales Company were for and in behalf of respondent Anaconda, and for the purposes of these findings will be treated as the acts of respondent Anaconda.

Anaconda ceased the manufacture and sale of lead pigments subsequent to the filing of the amended complaint in this proceeding, during July or August of 1946. Ana-

conda still produces lead ores and refined metallic lead; and is also engaged in the production of zinc oxide.

4. The Sherwin-Williams Company.

The Sherwin-Williams Company is an Ohio corporation with its principal office at 101 Prospect Avenue, Cleveland, Ohio, and is sometimes hereinafter referred to simply as Sherwin-Williams. Sherwin-Williams operates a factory producing white lead, red lead and litharge in the metropolitan area of Chicago, Illinois, and is one of the largest, if not the largest, manufacturers and sellers of mixed paints and related items, operating numerous paint producing plants and warehouses throughout the country. Sherwin-Williams also operates directly more than 200 retail stores located throughout the country selling mixed paints, lead pigments, and related items to consumers and the general public.

A considerable portion of the lead pigments produced by Sherwin-Williams is used by it directly in the manufacture of paint and related products and the remainder of its production is shipped and sold to others. The record shows that Sherwin-Williams is not engaged in the sale of red lead or litharge to the battery manufacturing industry, but is engaged in sale of such products to paint and varnish manufacturers and other users. Sherwin-Williams is a producer of a number of pigments which are said to be in competition with the lead pigments, including lithopone and zinc oxide.

5. The Glidden Company.

The Glidden Company is an Ohio corporation with its principal offices in Union Commerce Building, Cleveland, Ohio, and is sometimes hereinafter referred to simply as Glidden.

705 Glidden operates a white lead producing plant in Scranton, Pennsylvania, and a lead refining and red lead and litharge producing plant in Hammond, Indiana, in the Chicago, Illinois, switching area. Like Sherwin-Williams, Glidden is a large producer and seller of mixed paint and related items, and operates some 60 retail stores selling mixed paint, lead pigments, and related products directly to consumers and the general public. Glidden's white lead producing plant was formerly operated as the

Euston Lead Co., acquired in 1925; and its red lead and litharge producing plant was formerly operated as Metals Refining Co., acquired by Glidden in 1929.

Glidden is the largest domestic producer of lithopone, a pigment competitive with dry white lead. (Tr. 2648)

6. Non-Respondents Concerned in the Proceeding.

a. Lead Industries Association.

Lead Industries Association is a voluntary unincorporated trade association (Tr. 996) organized in 1928 to serve the mutual interests of the entire lead industry. It is composed of a Mining Division, a Smelting and Refining Division, a Lead Pigments Division, and a Metallic Lead Products Division. (Tr. 2368) During the pre-Code and Code period the Lead Pigments Division was further separated into a White Lead-in-Oil Committee and a Dry Products Committee, the latter having further sub-divisions into an Oxide Committee and a Dry White Lead Committee. (Tr. 2370) Members of the Lead Industries Association comprise practically the entire lead mining, smelting, and refining industry of the United States, as well as most of the industries using lead as a basic raw material, including manufacturers of lead pigments, lead sheets, pipe, shot, solder, and related items. (CX 500 A-H).

b. American Smelting and Refining Company.

American Smelting and Refining Company is a corporation with its principal office and place of business in New York, New York, and sometimes hereinafter referred to as A. S. & R. A. S. & R. is the world's largest smelter and refiner of lead, producing between thirty and forty per cent of the entire world supply of refined lead (Tr. 4093), and accounting for more than half the domestic supply (Tr. 4091). A. S. & R. operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four or five hundred lead mines (Tr. 4090). The position of A. S. & R. in the domestic lead market, and its dominance thereof, is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the sole basis for quoting spot carload prices on red lead and litharge (CX 809; CX 615; RX 137).

c. Trade and Commerce of the Respondents.

Each of the respondents is now and has for many years been engaged in commerce, as commerce is defined in
706 the Federal Trade Commission Act, selling and shipping lead pigments manufactured at the various producing points, as set forth above, to customers located in nearly every state of the United States, except insofar as respondents Anaconda and International have not been engaged in the lead pigments business since the fall of 1946. Each of the respondents seeks to enjoy and does enjoy national distribution of lead pigments and other products manufactured by them, except that respondents Eagle-Picher and Anaconda do a limited amount of business on the Pacific coast and in states west of the Rocky Mountains. (CX 752; 749; 843; 754; 854; 833; 794; 798; 831; 852; 739).

Between them the respondents account for practically the entire production of lead pigments, there being only a few small producers of such products for sale in commerce in the United States other than the respondents. It is to the respondents herein that purchasers and consumers must look for their supplies of lead pigments, and the respondents have the power to, and do, control the supply of lead pigments available for shipment in commerce. (CX 669) In addition to the power of the respondents to control directly trade and commerce in lead pigments, between them they account for a substantial portion of the production of and trade and commerce in competing products used as pigments in mixed paints and for other similar purposes. Glidden is the largest producer in the country of lithopone (Tr. 2648). Eagle-Picher and Anaconda are producers of zinc oxide (Tr. 3640, 2653). National and E. I. duPont de Nemours have recently been found to have a monopoly power in production and sale of titanium pigments, which are also produced and sold by Glidden through its subsidary American Zirconium Company. (Tr. 2648-50). Eagle-Picher and Sherwin-Williams both produce lithopone. (Tr. 2652).

II. The Lead Pigments Industry Up to 1933.

There were a number of witnesses called to testify who had been active in the lead pigments industry during the period prior to 1933 and back as far as 1910 (witnesses Sprague, Rowe, McNair, Coolidge, Hurless, Hayt and Zol-

ler). The recollection of these witnesses as to the organization of the industry and of the methods employed prior to 1933 in quoting and selling lead pigments were very vague. It is apparent, however, that until the organization of National Lead Company in 1891 the industry was characterized by a large number of producing plants located throughout the United States. An indication of the number of factory and producing points prior to the date of National's organization is contained in a price announcement in 1899 of the Atlantic White Lead and Linseed Oil Company which was later absorbed by National, becoming a constituent part of National's Atlantic branch (Tr. 3944-45). This announcement offered to equalize freight with 69 cities located in Texas, Virginia, West Virginia, Georgia, South Carolina, Florida, Alabama, Maryland, New Jersey, and New York.

Since its organization National has acquired numerous competitors in the lead pigments business through purchase of capital stock or assets and has abandoned pro-
duction at most of the acquired plants. By 1933 there
707 were less than a dozen white lead producing plants still in operation. There remained plants in San Francisco (National and W. P. Fuller, an independent); in Chicago (National, Sherwin-Williams and Anaconda); in Perth Amboy, N. J., St. Louis and Philadelphia (all National); in Scranton, Pa. (Glidden); and in Cincinnati (Eagle-Picher).

In 1933 there remained plants producing red lead or litharge for sale in commerce, in Chicago (National, Glidden & Hammond Lead Products Company, operated by the former proprietors of Metals Refining Company, acquired by Glidden in 1929); in St. Louis (National); in Joplin, Mo. (Eagle-Picher); in Brooklyn (National); in Newark (Eagle-Picher); in Philadelphia (National); in Charleston, W. Va. (Evans Lead Company, acquired in 1934 or 1935 by National); in San Francisco (National and W. P. Fuller, an independent); and in Los Angeles (Morris P. Kirk & Sons, a subsidiary of National).

While the number of producing plants had been reduced materially by 1933 the industry appears to have retained to some extent vestiges of localized pricing at that time.

As to white lead-in-oil and other lead pigments packaged in steel kegs containing 100 pounds or less, a system of differential or warehouse points was commonly em-

ployed up to 1933 or 1934. Commission's Exhibit 659-C through P is a list of the delivery and equalization points of the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia, and St. Louis branches of the National Lead Company. The exhibits are dated as far back as December 30, 1920, but are indicated to have been revised up to as late as March 30, 1933. This exhibit shows 589 different towns and localities as free delivery points or equalization points, located in forty different states. To the points marked either "D" or "E" lead pigments were quoted at the base price with the addition of whatever freight differential in fractional cents per pound appears opposite each point in the list. To all other towns and localities except those specifically designated freight was equalized with the nearest equalization point, designated with an "E". Thus on Commission's Exhibit 659-O there appears only one town each in the states of Alabama, Arkansas, Kentucky and Louisiana. In quoting to a customer in Alabama, 1¢ per pound was first added to the base quotation and then the freight rate was calculated to the customer's destination. In the event the rate to the destination was more than the freight rate to the equalization point, Mobile, the additional sum by which the freight rate was more than the Mobile rate was added to the delivered price.

It is readily apparent that this method of quoting, requiring knowledge of all of the different free delivery and equalization points and of the base additions applicable to each of them, together with the freight rates to the points and to all of the other cities and towns not listed as delivery or equalization points for purposes of the freight equalization calculation, made the method of pricing a highly complicated one in which a seller could never be sure in advance of what his competitor was quoting unless he had advance knowledge of his competitor's listed points and of the freight rates used by his competitor in making the calculations of equalization of freight rates (C.X. 501-C; Tr. 2600-1).

708 There were other practices prevalent in the industry in 1933 which affected materially the cost of lead pigments to purchasers. Dry white lead, for instance, was sold at times on differential contracts—whereby a price was quoted at a fixed differential over the prevailing market price of pig lead, the basic raw material (C.X. 754,

754-760). Guarantees were customarily entered into protecting customers over quarterly periods against declines in price by the seller, not only as to the dry pigments sold in barrels and drums but as to white lead-in-oil and the so-called keg products (C.X. 501-C). As to the oxides, red lead and litharge, differential contracts had been employed for several years prior to 1933, covering sales both to carload and less-than-carload purchasers. The differential to carload purchasers of litharge and red lead had been for some years in the range of $1.50 and $2.50 per hundred pounds respectively over the price of pig lead, but there was apparently no common understanding in the industry as to which quoted price of pig lead was to be used in pricing such differential contracts and the differential had not been uniformly $1.50 on litharge or $2.50 on red lead of standard grades (R.X. 177-B; R.X. 159-E; R.X. 138-A). As near as can be determined from the fragmentary documents on the subject and the imperfect recollections of witnesses who testified on former practices in the oxide field, territory differentials and zones were not employed prior to 1933 and freight was charged to the customer or paid by him on many transactions (Tr. 3076; 3084). Prices on the Pacific Coast prior to 1933 appeared to have been below those in the east (Tr. 3946).

As to all of the lead pigments there was a diversity of practices by the various respondents as to the time within which orders might be accepted for shipment at the old price following an advance in the price and as to datings of invoices giving purchasers the benefit of such old prices. As to dry white lead there was no provision for quantity discounts nor was there any higher differential to the Pacific Coast (Tr. 3946, 3947-3950). In spite of the imperfect recollections of the witnesses called as to the details it appears that there were diversities as between the respondents on many different practices relating to prices and terms and conditions of sale of lead pigments at the time when respondents met together in the fall of 1933 for the ostensible purpose of considering and drafting a Supplementary Code of Fair Competition for the Lead Pigments Industry (Tr. 1605; 2634).

709 III. Cooperative Activities 1933-1934:

During the summer of 1933 the respondents began meeting together through the Lead Industries Association for the purpose of drafting a Supplementary Code of Fair Competition for the Lead Pigments Industry. A basic code had already been promulgated covering labor provisions and other matters not related strictly to trade practices of the producers. The Lead Pigments Division of Lead Industries Association was the medium through which the discussions and group actions of the respondents took place.

The Chairman of the Lead Pigments Division of Lead Industries Association was F. M. Carter, President of National. The Chairman of the White Lead-in-Oil Committee was at first Willard E. Maston, Vice President of Eagle-Picher, followed by F. M. Carter, President of National. The Chairman of the Dry Products Committee of the Lead Pigments Division of the Association was also F. M. Carter, President of National. The Dry Products Committee in its later meetings apparently split into the Lead Oxide Committee, representing the red lead and litharge producers as distinguished from the white lead producers, and its chairman was Harold Rowe, Assistant to the President of National. In any event, the Lead Pigments Division and its various sub-divisions, all constituted practically the same group, National being represented primarily by its President, F. M. Carter, and Harold Rowe; Eagle-Picher by Messrs. Bendelari, its President, and Roosevelt and Maston, Vice Presidents; Glidden by its Vice President Paul E. Sprague; Sherwin-Williams by its Vice President S. B. Coolidge Jr.; and Anaconda Lead Products Company by F. O. Case, its Sales Manager.

All of the respondents participated actively in the entire series of meetings discussed in more detail below, although one or more of them may not have attended any particular meeting.

At the meetings on July 19 and July 20 a draft of a Supplementary Code of Fair Competition had been prepared but so many questions regarding trade practices were raised that it was agreed to meet again early in August for further discussions (C.X. 799; R.X. 134 A-E).

The following paragraphs were adopted at the August 8 meeting of the Dry Products Committee (C.X. 800 A-C):

"Oxides—

1. Red lead over 90% true red lead shall be sold at the following premiums over grades with lower true red lead content:

90% to 98% true red lead $.25 per cwt.
98% and over true red lead $.50 per cwt.

2. Only two grades of guaranteed red lead shall be sold, *i.e.* grinders red lead guaranteed 95% and red lead guaranteed 98%. Under 95% red lead may be labeled as desired.

710 3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale for freight movements from Member's shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries are to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

8. Terms shall be 1% for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

9. Delivery place shall be F.O.B. Member's shipping point.

10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lb., rail tariffs to govern.

11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

12. The price paid for l.c.l. shipments shall be a flat price established by the seller.

13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

711 14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

17. No rebate on customers' stocks shall be allowed on account of price decline.

18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

19. On Government bids and on railroad (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	$1.00

"Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts; but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

"There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

"It was felt that in the case of off-grade material sold

as such, a satisfactory differential below the standard grades should be developed.

"It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly true of large battery manufacturers who now are manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N. R. A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act 'to promote the fullest possible utilization of the present productive capacity of industries.' It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes."

712 On the following day the Dry Products Committee took up the matter of practices to be included in a Supplementary Code for dry white lead in which it was agreed to adopt Items Nos. 9, 11, 14, 15, 16, 17, 18, 19 and 20 as set forth in the minutes of the August 8 meeting of the Oxide group the day before as set forth above (R.X. 135 A-B).

Meeting again on September 6 and 7 the Dry Products Committee decided to frame uniform sales contracts covering dry white lead and red lead and litharge and discussed the possibility of limiting the installation of facilities for production of red lead and litharge. It was agreed as to contracts covering the sale of dry white lead at a differential over pig lead prices that the names of customers be filed with the Association (C.X. 801; R.X. 136).

A further meeting of the Dry Products Committee was held in Chicago on October 27, 1933, at which the third draft of the Supplementary Code was discussed and agreed upon. The following appears in the minutes (C.X. 504-B):

"After much study and discussion outlines setting forth Uniform Bases for the sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots, respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outline except

for the specification that 'prices were to be agreed upon between buyer and seller.'

"A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman."

It will be noted that the minutes direct the Secretary to consult counsel about the advisability of putting uniform contract provisions into effect prior to approval of the Code. The Secretary did consult counsel about this matter and wired and wrote to Carter, the President of National, as follows (C.X. 522-B):

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead Oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

713 "He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

"I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago."

On November 9, 1933, Carter wrote to Paul Sprague, of Glidden, sending copies to officials of Eagle-Picher, Anaconda and Sherwin-Williams as follows (C.X. 523):

"While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the

common use of a contract which sets forth general terms, specifies grades, etc. but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation."

The next day Carter wrote W. P. Fuller & Company in San Francisco to the same effect, including:

"* * * Furthermore, it is believed by all members of the Pigment Section, who were present during the discussions, that it is desirable to have the privilege of using such uniform sales contracts embodied as a feature in the Code." (C.X. 517-A.)

Again the Oxide Committee of Lead Pigments Division met in Chicago on December 14 and 15 and 27 and 28, 1933. The following appears in the minutes of December 14 and 15 meetings (R.X. 137 A-B):

"After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price for red leads containing 95%, 97% and 98% Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

714 "It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differential over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

"Pending the adoption of our code, it was decided that no new commitments would be made:

(1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.)"

The following appears in the minutes of the December 27 and 28 meeting (R.X. 138-A):

"There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

"Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in reissuing the information to members of the group he shall give only the names of the buyer and the seller.

"A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions."

At the same time that the members of the Dry Products Group were meeting together, the White Lead-in-Oil Committee also took up industry problems in selling white lead-in-oil and other lead pigments in kegs. This group comprised substantially the same officials representing the respondents, and its chairman was Mr. Willard Maston, Vice President of Eagle-Picher, followed by Mr. Carter, President of National. Among the more important matters discussed at the initial meeting of the White Lead-in-Oil Committee on August 9, 1933, as quoted from the minutes were (C.X. 501 B-C):

"The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted
715 territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two com-

panies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan.'

"*Freight Differentials:* There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting."

"The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

"The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion as to the method which might be used—the following being suggested:

Capacity
Last year's Government and State business
Average last three years Government & State business
Average last ten years Government & State business

The group was asked to give this further thought."

In the minutes for the White Lead-in-Oil Committee meeting of October 28 the following appears (C.X. 505-A):

"The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General
716 Electric and other companies and was designed to correct destructive price cutting in the white lead-in-

oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

"Freight and zoning problems were discussed without any understanding or agreement being made."

On September 8, 1933 (following a meeting of the Committee on September 6, the minutes of which contain no reference to the Agency or zone plans) Carter wrote the General Manager of E. I. du Pont de Nemours Company of Wilmington, Delaware, referring to the fact that National was representing that company in the Code discussions, and advising him as follows (C.X. 506-D):

"The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expecting to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as has been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example, where, under present conditions, prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer."

On September 14, Maston, as chairman of the White Lead-in-Oil Committee, wrote the Secretary of the Association and representatives of the other respondents enclosing what purports to be a zone map and a list of old freight differentials used in marketing white lead-in-oil, stating (C.X. 513-B):

"The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

"For your information file I am sending you a map and list of freight differentials points."

Following the last recorded meeting of the White Lead-in-Oil Committee during the Code period, on January 31, 1934, Maston wrote the Secretary of the Association as follows (C.X. 519-B):

> "I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self-explanatory.
> 717 "When new points are set up or any suggested change in the differential made they can in the future be passed through your office.
>
> "From this map we will eventually build up an official freight arrangement for this division of the lead industry."

The Secretary of the Association acknowledged this letter on February 2, 1934, stating (C.X. 519-A):

> "Thank you for mailing me a copy of the zone Map for the White Lead-in-Oil Industry."

The map referred to in C.X. 519-A and B was never produced and was apparently no longer in the files of the Association, so that it does not appear in the record.

The Code of Fair Competition for the Lead Industry as approved on May 24, 1934 (C.X. 809), deals principally with working conditions and other practices relating to employees in the industry. The final product of the meetings of the Lead Pigments Division are found in Article VII of the Code. Section 1, of this Article contains provisions against misbranding, misrepresentations, commercial bribery, inducing breach of contract, guarantees of life of products, false and derogatory statements regarding competitors, and use of lead pigments as a loss leader.

Section 2. of Article VII required each producer to file a list of prices with the Code Authority and a memorandum of any terms or conditions of sale at variance with those set forth in Schedule A of the Code.

Section 3. required submission to the Secretary of monthly reports of production, stocks and inventories and shipments.

Schedule A contained three articles—relating to conditions for sale of lead oxides in lots of less than 20 tons; conditions for sale of lead oxides in lots of more than 20 tons; and conditions for sale of dry white lead. Nowhere in the Code, nor for that matter in any draft of a Code produced at the meetings of the Pigments Division, is there any reference to zone or territorial differences or to use

of consignment contracts or arrangements on white lead-in-oil. The pricing provisions for oxides in carload lots set forth use of American Smelting & Refining Company quotations in quoting over pig lead prices, and set forth the differentials between the grades of red lead, but "out of deference to the statutes" the matter of how prices were to be arrived at was for the most part entirely omitted from Schedule A of the Code.

Furthermore, it appears from the record that the industry requested and received exemption from the provisions of Section 2 of Article VII and of Schedule A, so that at no time were prices or variations filed with the Secretary, nor were these provisions of the Code actually in force and effect.

718 National and Eagle-Picher adopted and put into effect the Agency Plan on November 15, 1933, following the discussions of the White Lead-in-Oil Committee and the correspondence about it with their competitors. As was stated in the letter from Harold Rowe to all branch managers, under date of November 9, 1933, advising them that the Agency Plan was to go into effect on November 15 (C.X. 601-B):

> "It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit."

The record indicates that Anaconda adopted the so-called Agency arrangement at about the same time and continued thereafter to market approximately 50% of its white lead-in-oil by this means (Tr. 3535-36).

The record is somewhat hazy as to exactly the dates on which the various zone systems were first put into operation by the respondents. In the letter of November 9, 1933, referred to above (C.X. 601-A) Rowe advised his branch managers that all cities where agencies are established will be considered delivery and equalization points, so that apparently the white lead-in-oil zone method was not put into operation until after that date. It is probable that the zone systems were initiated some time in May or June, 1934, or in the period of time immediately preceding those months. On June 9, 1934, Harold Rowe instructed all of the branch managers of National as follows (R.X. 159-A):

> "Please refer to our general letter of May 11th to which was attached Conditions for Sale, etc., of Oxides

and Dry White Lead. Since that date the zone differentials for oxides in the territory served by the Pacific Coast have been determined and a change has been made in New Mexico, Colorado, Wyoming and Montana applying to less carload lots.

"On dry white lead there has also been a change from our original instructions, in that a differential of ½¢ a pound has been added to the par price in those four states.

"The new zone schedules are as follows—

Oxides

For lots of less than 20 tons add differentials as shown to par card prices:

½¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, California and west of Cascade Mountains in Oregon and Washington.

½¢ per pound in New Mexico, Colorado, Wyoming, and Montana.

719 ½¢ per pound in Arizona, Idaho, Nevada, Utah and east of Cascade Mountains in Oregon and Washington.

For 20-ton lots add ½¢ per pound in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada and east of Cascade Mountains in Oregon and Washington.

Dry White Lead

For lots of 20 tons and for smaller quantities add ½¢ per pound in New Mexico, Colorado, Wyoming, Montana, Arizona, Utah, Idao, Nevada, California, Oregon and Washington.

"We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the states in your territory. It seems important, however, that you should have full information available in

your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed."

National did not wait for Code approval to put into effect what had been agreed upon as the terms and conditions of sale for dry white lead. On December 7, 1933, the Executive Committee resolved to establish the terms and conditions of sale of dry white lead as set forth in Article III of Schedule A of the Code, effective January 1, 1934, more than six months prior to the approval of the Code (Tr. 4076-77).

That this actually occurred is further borne out by the letter to all National branch managers by Harold Rowe on May 11, 1934, which contains the following (RX 159-B):

"Enclosed herewith are copies of the Conditions for Sale of Lead Oxides and Dry White Lead which have been included in the Lead Code as finally submitted to the N. R. A. for approval. We have postponed putting the oxide schedules into effect for several weeks in the hope that our code would be signed. Rather than wait any longer we have decided to adopt them for orders taken after May 31st. The necessary changes in the Conditions for Sale of Dry Lead were made on January 1st.

"It is planned to have those branches which issue oxide price cards send out on May 21st a notice similar to the one attached. (On such notices as are sent to customers in states carrying the extra ¼¢ differential all prices listed will be ¼¢ higher. In many cases it probably will be 720 advisable to notify customers by letter or through your salesmen.

"The most important changes are—

(1) The requirement of 20 tons in one lot to obtain a differential price and

(2) The adoption of a price for 5-ton lots.

We appreciate that the new basis will not be entirely satisfactory to every buyer of oxides, but we believe it to be more reasonable and fair than the practices of the past which have led us into many inequitable arrangements for which the only justification was that they were forced on us by competition. Buying on differential, originally limited to the largest accounts, has spread to such an extent as to include some customers whose tonnage would scarcely amount to a carload a year. The 5-ton price is being introduced to take care of the medium sized buyer who is

unable to meet the 20-ton requirement, but who is entitled to something better than the occasional user of a single barrel.

"Along with this letter we are sending you interpretations of several of the clauses in 'Schedule A', and some instructions which we hope will answer the questions that naturally will arise. If you are in doubt on any points please write us at once.

"Orders may be taken between May 21st and 31st on the present basis for shipment up to June 30th. The new conditions of sale will apply to all orders received on and after June 1st."

Attached to the letter quoted above are the "Interpretations" of Schedule A of the Code which make it apparent what the respondents actually intended to put into effect and operation above and beyond what is stated in the literal text of Schedule A. For instance, it is stated in interpreting Article I of Schedule A that certain states will take a ¼¢ differential over the par zone; that "all sellers have agreed to discontinue the old ninety-day card price contracts"; and that as to the rule against protection against price decline "there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply on any order is that 'in effect on the date order is received'" (RX 159-D).

Regarding the provisions of Article II of Schedule A, sales of red lead and litharge in carload lots, the "Interpretation" contains the following (RX 159-E):

"The differentials, which will apply to 20-ton lots, will be as follows in par territory:

$1.50 for Litharge and Special Negative Battery Oxide.

$1.75 for Special Positive Battery Oxide.

$2.50 for Red Lead up to and including 95%.

721 "There will be an advance of ¼¢ a pound for shipments to Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming and Montana. (Schedules for states served by Pacific Coast not yet determined.)"

There is no issue over the adoption of the Agency Plan by National and Eagle-Picher on November 15, 1933, and over the fact that the respondents each began to employ the various zone systems at sometime in the period from November, 1933 to June, 1934, except as to the position taken by Sherwin-Williams, which will be discussed in

more detail below. It is clear that a number of other significant changes in trade practices were likewise first employed by the respondents following the discussions in the Lead Pigments Division more fully set forth above.

All of the officials of the various respondents who were called as witnesses denied the existence of any agreements or understandings with other respondents as to prices, terms or conditions of sale subsequent to the Code period, and all of them denied any price fixing agreements at that time. However, the character of the Code discussions can be appreciated more fully in the light of the following testimony by Mr. Paul Sprague, Vice President of Glidden and a principal participant in the Lead Pigments Division meetings (Tr. 2633-34):

"Q. Now getting to those discussions in the Code period, I assume now you are referring to the meetings of the various branches of the Pigments Division. At those meetings did the members present discuss fully the practices which were then and had been in the past employed in marketing these various pigments?

A. Well, the meetings that I attended discussed quite thoroughly all phases that related to the problems of the industry in the light of the situation in those days—everything we could think of.

Q. Did those discussions include suggestions by those present as to improvements which could be made in the marketing practices of the industry?

A. Very definitely, sir, they did.

Q. And those were full and complete discussions of those problems?

A. I can recall of no limits that were placed on anybody in those discussions.

Q. Were those people in general agreement as to many of the things which were discussed as improvements, as to the value of them in the industry?

A. Well, the history of those meetings was this, that there were many differences of opinion and as they met further and wrestled with problems they probably had the same situation as confronted General Marshall, they finally threshed them out to a point where they could agree on recommendations for the Code."

722 Since the discussions between the respondents and their agreements went to practices which were never included in any draft of a Code, and were apparently never intended to be included in such Code, as well as to prac-

tices which were covered by provisions of a Supplementary Code which the respondents never permitted to become operative, the conclusion is inescapable that the discussions set forth more fully above were for the purpose of a cooperative revision of pricing practices in the industry beyond the sanction of the National Industrial Recovery Act.

The respondents were aware of their responsibilities under the Anti-Trust laws and that they were not being invited by the Government to enter into a price fixing conspiracy. In the minutes of the Dry Products Committee meeting of October 27, 1933, appeared the following (CX 504-B):

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that 'prices were to be agreed upon between buyer and seller'."

Further, counsel was consulted about adoption of the various practices prior to Code approval and made the suggestion, which appears to have been followed, that such action "by agreement" might be a violation of law, so that one company should announce a change in practices and the rest of them follow:

"without agreement on the subject but merely because it was individually to their best interests to do so." (CX 522-B)

Furthermore, the President of National on July 28, 1934, made a public announcement to the press showing his awareness of the existence of the Anti-Trust laws and expressing his opinion that the N. R. A. Codes provided an illusory exemption from the provisions of such laws (RX 168).

The record is clear that the respondents reached understandings and agreements between and among themselves in the period from July, 1933 to June, 1934 to do the following things (except that Anaconda and International did not participate as to red lead and litharge):

(1) Sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less on the basis of flat delivered prices to customers within designated zones, and with uniform differentials applicable within such zones, as set forth in the white lead-in-oil and keg products zone map attached hereto and made a part hereof;

(2) Sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling

resale prices in the trade and preventing competition between themselves and their customers (except that Sherwin-Williams and Glidden did not take part in this understanding);

723 (3) Sell lead pigments in kegs and cans at uniform differentials of 25¢ per 100 pounds between keg sizes of 12½, 25, 50 and 100 pounds;

(4) Eliminate and refrain from permitting guarantees against declines in price upon lead pigments packaged in kegs or cans and red lead and litharge in less than carload lots;

(5) Sell dry white lead (both basic carbonate and basic sulphate) upon the basis of flat delivered price quotations to customers; within designated zones, and with uniform differentials applicable to such zones, as set forth in the dry white lead zone map attached hereto and made a part hereof;

(6) Sell dry white lead upon uniform discounts and terms of sale, with a uniform addition to price quotations for delivery in lots of less than twenty tons;

(7) Eliminate and refrain from entering into contracts to supply dry white lead at a stated differential over the price of pig lead;

(8) Sell red lead and litharge in drums or barrels and in quantities of less than twenty tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the less-than-carload red lead and litharge zone map attached hereto and made a part hereof;

(9) Sell red lead and litharge in drums or barrels and in quantities of more than 20 tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the carload red lead and litharge zone map attached hereto and made a part hereof.

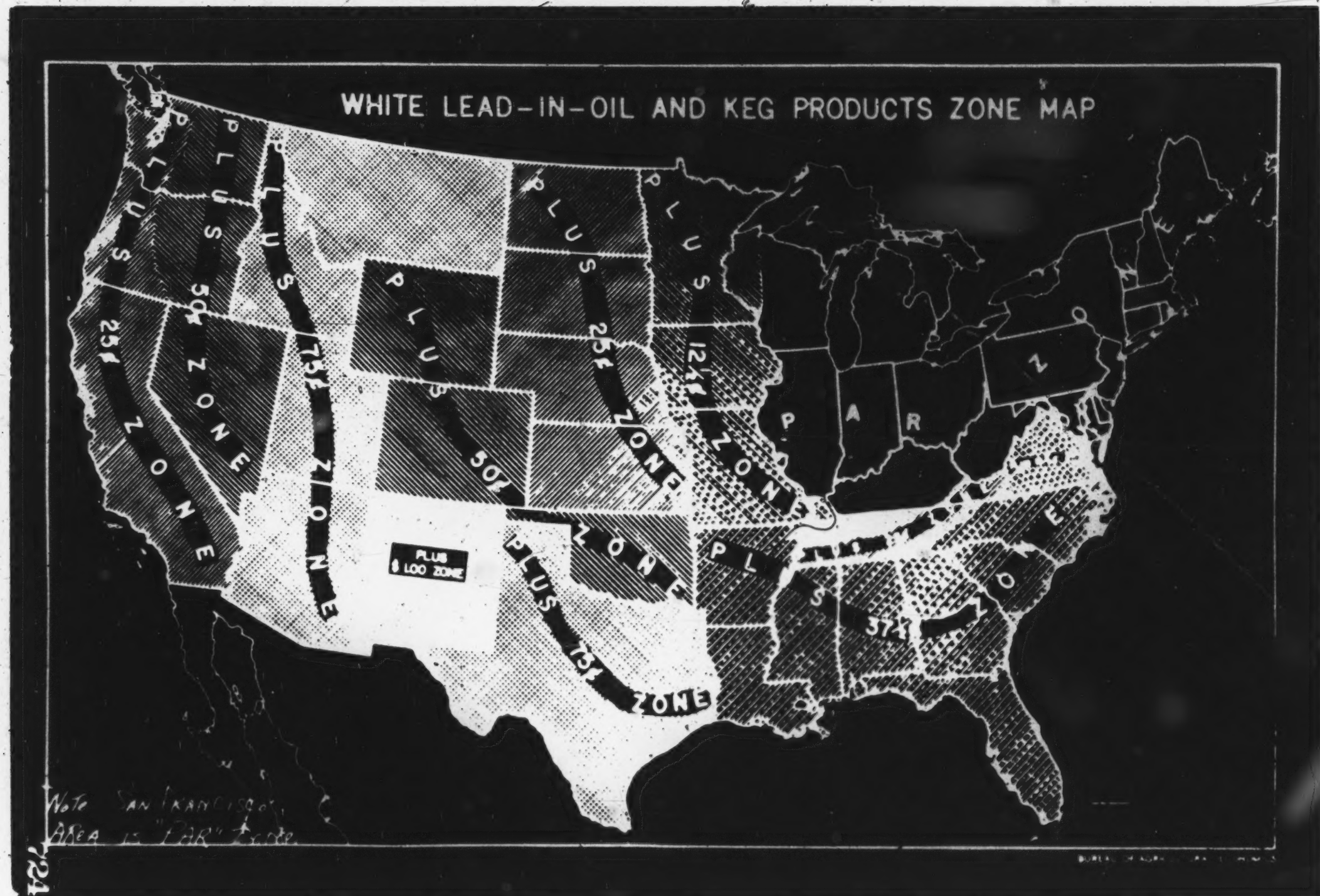
(10) Eliminate and refrain from entering into contracts to supply red lead and litharge in quantities less than 20 tons at a stated differential over the price of pig lead;

(11) Quote and sell red lead and litharge in quantities of less than 20 tons on the basis of price cards distributed to the trade and calculated on a differential over pig lead prices to move up or down with fluctuations in the lead

market in multiples of not less than 25¢ per hundred pounds;

(12) Quote and sell red lead and litharge in 20 ton quantities on the basis of differentials over the price of pig lead as quoted by the American Smelting and Refining Co. for delivery in New York as follows, to move up or down with fluctuations of pig lead prices in multiples of not less than 5¢ per hundred pounds:

Litharge	$1.50 per cwt.
Litharge (75%) Red lead (25%)	1.75 per cwt.


WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP
PLUS 25¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PLUS 25¢ ZONE
PLUS 12½¢ ZONE
PLUS 75¢ ZONE
PLUS 37½¢ ZONE
PLUS $1.00 ZONE
PAR ZONE
Note San Francisco Area is "PAR" Zone

724

3405

DRY WHITE LEAD ZONE MAP

3406

CARLOAD RED LEAD AND LITHARGE ZONE MAP

3407

LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP

3408

728 95% Red Lead ..... $2.50 per cwt.
97% Red Lead ..... 2.75 per cwt.
98% Red Lead ..... 3.00 per cwt.

(13) Fix arbitrary discriminations between carload, 5 ton and less than 5 ton purchases of oxides in 600 pound barrels by calculating card prices, as set forth in (6) above, on the basis of the following differentials over the American Smelting and Refining Co.'s New York price of pig lead:

Litharge	$2.50
Litharge (75%)—Red Lead (25%)	2.75
95% Red Lead	3.50
97% Red Lead	3.75
98% Red Lead	4.00

(14) Establish arbitrary prices, terms and conditions of sale applicable to sales to customers classified as government, railroads, steamship lines and industrial.

IV. Adherence to the Conspiracy.

With certain exceptions the respondents have followed the pricing practices and terms and conditions of sale, agreed upon as found above, from 1934 to the present time.

The pricing practices of National are well documented both by copies of price announcements, by invoice records showing sales pursuant to the agreed provisions and by testimony of National officials who were called as witnesses. Commission's Exhibit 752 A-Z144 is a tabulation of invoices compiled directly from the records of National showing sales of lead pigments in about 60 different cities during two quarters of 1941 and one quarter of 1943. The adherence to the zone system and the trade classifications shown from these thousands of transactions demonstrate an inflexible adherence to the zone system by National. National's practices in selling in accordance with the system was described by the manager of the Trade Sales Department, Mr. McCarthy, as follows (Tr. 1099):

"Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead Company over the period of your experience with the company?

A. Definitely."

The manager of the Dry Products Department of National, Mr. Merson, was called as a witness and testified that the company has generally followed, at least from 1938, when he assumed his present position, the terms and conditions of sale set forth in Schedule A of the Supplementary Code (Tr. 1650-1656) and that National has
729 generally employed the differentials of $1.50 for litharge and $2.50 for red lead over American Smelting & Refining Company's quotations on spot sales or American Smelting and Refining Company, American Metal Market, or Engineering and Mining Journal average price quotation of pig lead (Tr. 1636, 1652).

The prices, terms and conditions of sale generally employed by National during the period from 1934 to date, in the form of price cards, price announcements and instructions to branch managers as to pricing showing adherence to the system appear in the record as Commission's Exhibits 595, 659, 806, 862; Respondent's Exhibits 154, 158, 167.

The only deviations from the trade practices and pricing methods shown in the record as to National are in some sales to very large battery manufacturers and in some bids to three Federal Government Departments (CX 843-850; RX 306-308). The record shows that both Eagle-Picher and National, in the period of the last quarter of 1941 at least, made concessions from the regular differentials on carload purchases of battery oxides by the large battery manufacturers. These deviations may be assumed to be the result of pressure on the respondents by very large consumers of battery oxides who might have been in a position to produce their own red lead and litharge unless some concession were made to them, as more fully set forth below. As to the bids submitted in 1941 to the United States Navy, United States Treasury and Panama Canal, there is considerable dissimilarity in offered prices. On the other hand, in bids submitted to the cities of Cincinnati and Milwaukee (CX 864, 865) the various respondents quoted identical bids, strictly in accordance with their announced terms and conditions of sale. In view of the background of respondents' discussions in the White Lead-in-Oil Committee meeting of August 9 (CX 501) where they sought to reach an understanding on a method of allocating Government business between them by prearrangement and collusive bids, it is not thought that the evidence as to dis-

similar bids to the three Government Departments is persuasive evidence of substantial competition between them. Even if such were the case, however, price differences as to one particular type of customer, and rigid adherence to the agreed system as to all other types of customers, including other agencies, does not detract from the conspiracy as found.

The record shows that Eagle-Picher followed the pricing practices and policies of the National Lead Company from 1934 on with but a single exception—that in some instances Eagle-Picher did not follow certain quantity allowances as to white lead-in-oil sold direct to painters, a very minor part of the business in white lead-in-oil. Like National, Eagle apparently found it necessary to depart on occasion from the regular carload differentials in selling to very large battery manufacturers who were in a position to produce their own oxides (CX 854 A-D). An official of Eagle-Picher who was called upon to testify stated that Eagle had followed the zones since 1933 or 1934 substantially as they are set out in the maps attached hereto 730 (Tr. 1550). The same official testified as follows (Tr. 3686-87):

"Q. Well, then, if these prices of white lead in oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can you tell me of any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices, leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?

A. Not in that period you mentioned, I don't think there were any exceptions or occasions where they didn't follow."

Another official of Eagle-Picher testifying regarding the dry products, testified that the carload differentials, card prices and zones, as well as most of the terms and conditions of sale as set forth in Schedule A have been followed by Eagle-Picher in the period subsequent to the Code (Tr. 1590-1621).

The price cards, announcements to the trade, instructions to salesmen and branch officials, and invoice records of Eagle-Picher during the period subsequent to the Code likewise show adherence by that company to the agreed pricing methods and terms and conditions of sale (CX 585-590; 658; 660; 754; 838; 840).

The record shows that Anaconda, along with its subsidiaries, adhered to the zone methods and pricing policies agreed upon as to white lead-in-oil and dry white lead, the only two pigments produced by them, from the Code period to 1946, with one deviation. An official of International was called as a witness and testified as follows (Tr. 3505):

"Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than that sold by your competitors?

A. No."

The same witness testified later (Tr. 3585):

"Our prices were based on what our competitors were doing."

The only deviation by Anaconda was in sales of white lead-in-oil. The Anaconda brand was relatively a newcomer into the industry and difficulty was encountered in establishing it with dealers against the better known Dutch Boy and Eagle brands. Thus, while the same resale prices to consumers and painters were set by Anaconda as were set by National and Eagle-Picher, the dealer price was 25¢ per hundred lower, for the purpose of giving the dealer an extra compensation of 25¢ per hundred pounds for handling the lesser known brand (Tr. 3513; 3585).

When asked about adopting the two-zone for their selling dry white lead, a witness for International testified as follows (Tr. 3498):

731 "Q. Why did those companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis."

The evidence in the record in the form of price cards, price announcements, zone maps, and stipulated facts, shows that Anaconda and International followed the system adopted in 1933 and 1934, with the one deviation noted above, from the Code period to 1946 (CX 591, 592, 661, 738, 739, 795 and 836).

Respondent Glidden likewise adopted and followed the agreed pricing practices and terms and conditions of sale, with minor deviations, from the period of the Code to the present time. The invoices, price cards, instructions to salesmen and other documents in the file, including tabulations of sales records, show adherence to the zone system and the other practices, with the exception that for a period of time Glidden offered dealers purchasing white

lead-in-oil outright a price 20% lower than the price to dealers on consignment and the prices of respondents National and Eagle-Picher. Since resale prices to consumers and painters were identical with those of the other respondents, this concession, as the similar concession of Anaconda and of Sherwin-Williams, served as an added incentive to the dealer to promote the sale of Glidden's products, without disturbing the resale price level.

Glidden did not enter the agreement to adopt the Agency Plan in 1933 and when it did utilize Agency contracts in the period from 1939 to 1941 it apparently did so with some reluctance.

An indication of the extent to which Glidden followed the actions of its competitors is the statement of Sprague, its Vice President and a principal participant in the Pigments Division meetings, that the regarded price competition as an unhealthy condition in the industry and that it was never to Glidden's interest to initiate any change in prices (Tr. 2561). Mr. Sprague stated all through his testimony that it had been Glidden's practice from the Code period onward to follow the prices of National. One exception to that in the period before 1936 was a differential of $\frac{1}{8}¢$ per pound on dry white lead sales to paint manufacturers which had been granted by Glidden up to that time to overcome the reluctance of paint manufacturers to purchase from a competitor (Tr. 2458-2656).

The extent of following of National and other respondents by Glidden is illustrated by Commission's Exhibit 774 which is a letter from the manager of Glidden's San Francisco Branch under date of July 6, 1945, transmitting price information to the central office of Glidden which contains the following note:

"Due to the fact that we have been unable to find any price list for the first and last quarter of 1941, Mr. Ehrke suggested that you may want the National Lead price list for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours."

732 The documents in the record in the form of price cards, price announcements, instructions to branches, invoices, and tabulations of invoices showing adherence to the agreed terms and conditions of sale and pricing practices are Commission's Exhibits 757 through 767, 771, 772, 798, 810, 829, 830, 831 and 841.

With some deviations, respondents Sherwin-Williams has

also adopted and put into effect in the period from the Code the agreed pricing practices and terms and conditions of sale. It is the contention of Sherwin-Williams that zones are not employed in quoting and selling on lead pigments and that the present method is one of free delivery and equalization points as previously utilized in the industry prior to the conspiracy. This contention will not withstand close inspection and it appears from the testimony of witnesses and from price cards and announcements of the company that it follows the zone methods and other conditions and terms of sale with a few deviations. In billing to all of its company-owned stores Sherwin-Williams follows the zones and differentials as set forth in the map; and it follows such zones and differentials in selling to customers wherever located who purchase in truckload quantities. Such quantities may be as little as 10,000 pounds and include paint or any other item sold by Sherwin-Williams. When it had been testified by a Vice President of Sherwin-Williams that the company invariably added freight charges in sales of white lead-in-oil away from the shipping points appearing on its price cards, numerous invoices were presented, which had originally been recorded in tabulation form in Commission's Exhibit 662 A-Z26, showing that Sherwin-Williams did not require customers in towns away from its shipping points to pay additional charges (CX 833 A-Z100).

Following this evidence, officials of Sherwin-Williams were called who modified the original statement of policy and testified that the company added freight charges to customers located away from shipping points only when such customers purchased in quantities of less than carload or truckload and except when competitors' use of the zone method required Sherwin-Williams to absorb or pre-pay freight charges (witnesses Brown, Tr. 3694; Lemke, Tr. 3743; and Lewis, Tr. 4103).

It is found, upon the basis of the documents in the form of invoices, price cards, bulletins to branches, and testimony of these witnesses, that Sherwin-Williams followed the zone method and other trade practices in all but a few transactions.

The following of the system in quoting on various lead pigments by Sherwin-Williams is graphically set forth in Commission's Exhibit 662-A through Z26 and in Commission's Exhibits 777 through 782-F. Except that Sherwin-

Williams quoted a dealer price 25¢ lower on white lead-in-oil than that quoted by National and Eagle-Picher, and in the same manner as respondents Glidden and Anaconda, the use of the zone methods and other practices has been in conformance with the similar actions of the other respondents.

In addition to the price information in the form of exhibits cited above, the record contains other evidence of conformity with the system, including Commission's Exhibits 784, 794 A-Z13, 823 A-G (showing use of the zone and other practices on dry red lead and litharge) and 833 A-Z100.

733 V. Discriminations Under Count II.

The discrimination in price found to be supported by the record fall into two principal categories—discriminations in not realized prices and in systematic variations thereof through zone differentials and transportation charges; and discriminations arising through differing quantity bases in the sale of red lead and litharge, and in classifying customers for white lead-in-oil by National.

In the lead pigments industry the cost of the basic raw material pig lead, is an inescapable item which usually amounts to 50% or more of the producer's quoted prices. Sprague, testifying in behalf of Glidden, characterized the producer of red lead and litharge as a converter and the spread between the cost of the pig lead and the selling price as a toll (Tr. 2563). Respondent's Exhibit 142 shows the metallic lead content of the principal pigments as follows:

White lead-in-oil	73.6%
Dry basic carbonate	80%
Red Lead	90.66%
Litharge	92%

Since none of the respondents is in a position to produce, in the sense of mining or smelting or refining, more than a fraction of the requirements of pig lead, each of the respondents must maintain a working inventory of metallic lead which, in the case of Glidden at least, is kept at a minimum to avoid speculation in the metal market. Thus, Glidden seeks to buy pig lead as it sells lead pigments (Tr. 2546-47). This being the case, price, in the sense of being the gross operating revenue from sales of

lead pigments, is the amount received by the respondents at the shipping point less the cost of the basic raw material, lead. In most instances, this gross revenue at the shipping point is less than the cost of the pig lead and it must bear all of the factory costs, overhead, depreciation, taxes, selling and credit expenses, and profit.

In processing 100 pounds of pig lead a respondent may expect to produce 105 pounds of litharge or 109 pounds of red lead. Figured on the basis of 92% lead content, as in Respondent's Exhibit 142, in the last quarter of 1941 pig lead was quoted on the New York market at $5.85 a hundred and litharge in carload quantities was figured at $7.35, so that the cost of metallic lead as contained in the finished product was $5.382, and the gross margin between the lead cost and the delivered price quotation was $1.968 per hundred pounds. Actually, this gross margin is too large since there is an inescapable loss in the process of manufacture.

Assuming for convenience a loss of lead in processing of $.018 per hundred pounds, the highest net return that could be received from a carload sale of litharge would be $1.95, deducting the inescapable pig lead cost. Since the price to a 5-ton purchaser is based on the card relationship to pig lead, it was, in the last quarter of 1941, $.40 per hundred higher; and the less-than-five ton price $.90 higher. The highest net return to the respondents on this basis, as between the three classes of customers is thus:

734

Per cwt.		Per 600 # drum
Carload	$1.95	$11.70—65 or more drums
5-ton	2.35	14.10—17 or more drums
Less 5-ton	2.85	17.10—Less than 17 drums

Expressed in this fashion, it is apparent that the respondents receive nearly 50% more gross revenue from sales to purchasers of 17 or fewer drums of litharge than from purchasers of 65 or more drums. Translated into the competitive situation existing among purchasers in the battery manufacturing industry, this differential between the carload and less-than-five ton purchasers means a saving in materials cost of $.10 in favor of the larger purchaser.

The record shows that the storage battery industry is constituted of more than 200 companies, ranging from multiple plant operations of the United States Electric

Storage Battery Company, and its subsidiaries Willard and Grant, to small proprietorships whose production of batteries may be less than 50 units a day. The testimony in the record, by officials of the respondents and representatives of the various battery manufacturers who were called as witnesses shows that the storage battery business in the period from the Code to 1941 was characterized by sharp price competition, particularly on the part of some of the large battery manufacturers such as Globe-Union Company (a subsidiary of Sears, Roebuck & Company), National Battery Company, and Bowers Battery Company. During most of the period small 13-plate 60-ampere automotive batteries were being marketed at retail prices at or below the cost of production.

It is clear from the record that a saving of as much as 10¢ per battery on material costs would have been a matter of considerable competitive importance to the customers of the respondents who purchased in the higher price categories on red lead and litharge, and that they were during more normal competitive times at a distinct disadvantage in seeking to compete with the more favored larger customers (testimony of witnesses Eagan, Tr. 1923; Florence, Tr. 1905; Lunkes, Tr. 1872; Sweet, Tr. 1748).

The price difference of nearly $6.00 per barrel between the two classes of customers is still further widened by the fact that in many instances the smaller purchasers are located in the same city as the respondents' producing plants, and the larger customers taking the more favorable price are so located that the respondents must allow a reduction of as much as $3.00 per barrel additional for shipping costs. Thus National sold in 1941 to two small battery manufacturers located in St. Louis, Missouri, delivering by its own truck out of its St. Louis plant at the less-than-five ton price, which is $5.40 per barrel higher than the carload price, and to two small battery manufacturers at the five-ton price which is $2.40 per barrel higher than the carload price (CX 853F); and at the same time sold on the carload basis to large manufacturers of storage batteries in Omaha, Nebraska, where the carload freight rate is $1.74 per barrel; Indianapolis, Indiana, where the rate is $1.32 a barrel; in Muncie, Indiana, where the rate is $1.44 a barrel; and in Niagara Falls, New York, where the rate is $2.36 a barrel (CX 853-F, G). The carload customers involved in the transactions to Omaha, Indianapolis, Muncie

and Niagara Falls were all shipped out of the St. Louis branch, and were Grant Storage Battery Company, a Willard-Exide subsidiary; Prest-o-lite Company, Inc., 735 one of the largest manufacturers of batteries and Delco-Remy Division of General Motors Corporation. The four less-than-carload accounts in St. Louis are manufacturers who produce batteries on a small scale with very limited distribution (Tr. 1919-20, 1924). The proprietor of one of these customers, Sidney Battery Manufacturing Company, listed as a five-ton purchaser, was called as a witness and testified that he had been a customer of National Lead Company out of the St. Louis plant for approximately twelve to fifteen years, purchasing on either the less-than-five ton or the five ton basis and engaged in producing up to 135 storage batteries per day, the capacity of his plant. This witness testified that competitive conditions during the period from 1936 to 1941 in the sale of storage batteries in the St. Louis area were "so bad that the only way we could get by and make a living was to use the old battery cases over again"; that the competition of Grant Storage Battery Company, Majestic and Monark of Chicago, and Sears-Roebuck was such that the enterprise had gone "broke" in about 1933; and that in the following period his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck (Tr. 1926-28).

Commission's Exhibit 853-A shows that during the same period of time National sold Globe-Union, Inc., the battery manufacturing subsidiary of Sears-Roebuck, on the carload basis, shipping from St. Louis to Memphis, Tennessee, at a rail freight rate of $1.98 per barrel, and from St. Louis to Milwaukee, Wisconsin, at a rate of 96¢ per barrel.

Numerous small battery manufacturers, purchasing from respondents Glidden, Eagle-Picher, and National, were called to testify. These witnesses had all purchased at the five ton or less-than-five ton price and were engaged in sharp competition with other customers of these respondents located both in Chicago and at distant points who purchased on the carload basis. Several of these witnesses testified that in the period from 1936 to 1940 price competition was so severe in the storage battery industry that they were unable to meet the prices of the large manufacturers without incurring a net loss. They stated that a saving in material costs amounting to from 5 to 10¢ per

storage battery would have made considerable difference in their ability to compete during the period from 1936 to 1941 (Tr. 1753, 1761, and 1880).

The respondents are willing to accept on sales of litharge to carload purchasers a gross revenue after shipping costs of as little as $9.00 a barrel, while at the same time requiring small independent manufacturers located in the same cities as the respondents' factories and in direct competition with the carload purchasers to pay a price yielding nearly twice this gross revenue after shipping costs.

It is apparent from the record that the wide disparity in prices to the less-than-carload and carload purchasers in the oxide field can be accounted for by the fact that the extremely large producers of storage batteries do in some instances produce their own oxides and may be in a position to do so economically if their consumption is in excess of 4,000 tons per year. This fact may account for some of the deviations below the differential of $1.50 over the
736 New York price of pig lead which are shown to have been made by National and Eagle-Picher to such large battery manufacturers notably Grant, in Minneapolis and Omaha.

Unfortunately for the small battery manufacturer who makes from 50 to 150 batteries a day, or even in excess of that number, not only can he never construct furnaces costing many hundreds of thousands of dollars to produce his own litharge and red lead—he cannot even invest the several thousand dollars necessary to purchase a car of litharge for delivery at one time; and some of them could not in 1941 make the outlay of $775 necessary to purchase 10,000 pounds at one time at a saving of $3 per barrel (Tr. 1886).

The zone system in oxides as practiced by respondents discriminates between geographical areas in the differentials between zones, with the effect of further widening the discriminations against l. c. l. purchasers in some instances. National operates plants producing red lead and litharge in Dallas, Texas, and in Atlanta, Georgia. Both of these plants are located in a premium zone, so that in delivering to customers in Dallas from the Dallas plant a differential of 1¢ a pound or $1.50 per barrel is added, although the only transportation costs involved are deliveries in company-owned trucks from the plant to customers in the same city.

The record shows that National sells to Vitalic Battery Company, Inc., of Dallas, Texas, on the carload basis, delivery being made out of the Dallas plant at switching costs of $8.30 per car. It was stipulated in the record that if an official of Vitalic were called as a witness he would testify that red lead and litharge have been purchased from Eagle-Picher and National on the published carload prices for delivery in Dallas; that the company markets storage batteries in Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana, and New Mexico; that the cost of lead oxides amounts to approximately 33% of the total material cost; and that the battery business is highly competitive in its market arrangements in normal times, chiefly from the following concerns:

Willard Storage Battery Company
Exide Storage Battery Company
National Battery Company
Sears, Roebuck & Company (Globe-Union)
Montgomery Ward
Western Auto Supply
Auto-Lite
Continental & Lyle

It was further stipulated that in normal times, in the period from 1937 to 1941:

"a saving in material cost of 5 to 10¢ per battery would be an important saving to us in times of normal competition." (Tr. 2022-24.)

The record shows that these large competitors of Vitalic are located in the par zone where the delivered price is $1.50 a barrel less than in Dallas, and that in some instances the freight rates absorbed by the National Lead
737 Company in shipping to such customers in the par zone are in excess of the sum added to the price to the customer in Dallas (CX 853 A-W).

In following out the zone system Glidden was willing to sell litharge and red lead in carload quantities to customers in Philadelphia, Reading, Pa., and Corydon, Iowa, reducing its gross revenue by 41¢ and 38¢ per hundred pounds respectively, a shrinkage of more than 20% in what it actually realized at the mill, while at the same time imposing the par zone price on carload purchasers in the city of Chicago where trucking charges were 11¢ a hundredweight (CX 852-B). In the case of Glidden's sales of red lead and

litharge to 5 ton and less-than-5-ton purchasers, its mill net realization was shrunk as much as $1.00 in selling to distant customers as against those located in the Chicago area (CX 852-B and C). Out of the St. Louis branch of the National Lead Company sales were made locally of red lead and litharge to purchasers on the 5 ton and less-than-5-ton basis and deliveries made in company-owned trucks, realizing the highest possible sales revenue, and at the same time shipments were made to purchasers in the same category at more distant points resulting in a shrinkage of the net realization of more than 50¢ per hundred pounds (CX 853 E, F, G).

In the case of Eagle-Picher, sales were made of red lead and litharge out of the Newark plant to nearby customers, shrinking net realization by 9¢, at the same time as much as 94¢ per hundred pounds was being absorbed in shipping to more distant customers (CX 854-A through D). Likewise, from from the Joplin, Mo., plant Eagle-Picher was quoting and selling red lead and litharge in the last quarter of 1941 at points on the Pacific Coast, taking the par zone quotation, shrinking its net realization as much as 71¢ per hundred pounds, while quoting and selling to customers in and around Joplin and Kansas City where it realized 50¢ per hundred pounds more for its products (CX 854-A through D).

Furthermore, Eagle-Picher maintains its principle producing plant at Joplin, in the southwest corner of Missouri, less than a score of miles from both the Arkansas and Oklahoma borders. Joplin is in the heart of the tri-state lead field and it is in this field that Eagle-Picher conducts lead mining, smelting and refining operations as well as operating its red lead and litharge plants. Eagle-Picher is shown to be entirely willing to ship pigments produced at Joplin over most of the par zone, into North Dakota, Minnesota, Michigan, Ohio, and Kentucky, at the so-called par price shrunk by the freight involved, yet until it was made "par" territory in 1942, a differential of 25¢ per hundred pounds was added for sale of red lead and litharge to customers in Oklahoma and Arkansas, less than a dozen miles away.

Commission's Exhibit 752-Z120 and Respondent's Exhibit 162-B and C show sales by National to competitors named by the St. Louis paint manufacturers who are located in Kansas City, Omaha, Houston and Dallas in less than carload quantities where National, by pursuing the zone sys-

tem and absorbing or allowing freight charges to destination, shrank its St. Louis price by amounts of 19½¢, 39¢, $1.32, and 48¢ respectively per hundred pounds.

738 To have granted the customers located in the same city with its St. Louis plant the benefit of their advantageous location in the form of a price from which was removed the arbitrary average differential for transportation, would have enabled the paint company customers of National to compete in their former markets without the injury which they have suffered as a result of the zone system.

Respondent's Exhibit 214 is a calculation by the St. Louis Branch of National showing that in 1941 the average freight and cartage on dry white lead sales out of that branch was 35¢ per hundred pounds. The actual cost of cartage in selling to the St. Louis paint manufacturers was no more than 10¢ per hundred pounds and is included in the first figure. Thus, the calculation of prices by National so as to include in its delivered price quotations an item of 35¢ per hundred pounds for dry white lead, imposes upon customers located adjacent to its plant, requiring them in effect to pay the freight to distant customers with whom they are in sharp and bitter price competition.

Regarding zone discriminations in the sale of dry white lead, a number of witnesses were called who were engaged in the manufacture and sale of ready-mixed paint and related items in the city of St. Louis, competing with some of the respondents here as well as with other large manufacturers of paint. The substance of their testimony is that in normal times the mixed-paint business is one characterized by sharp competition; that outside house paints containing lead pigments are the leading competitive item in a paint line; and that, in the period from 1936 to 1941 there was a very close margin of profit in the sale of ready-mixed outside white paint containing lead pigments (testimony of witnesses Casey, Haddock, Niedt and Waters, Tr. 1388-1478). It was testified that the small St. Louis paint manufacturers located in the same city with the National plant were engaged in competition with paint manufacturers in the states of Texas, Mississippi and Tennessee, as well as other states, and that the freight costs of shipping paints into these areas circumscribe the business of the St. Louis paint manufacturers. Prior to 1932 the St. Louis manufacturers were able to command a 15¢ higher delivered price on paint in the state of Texas than locally in St. Louis,

but since that time they have been required by competition to lower their Texas prices in order to compete (Tr. 1359). It was stated by one of these witnesses (Tr. 1449):

"I mean by that that outside white paint is the most highly competitive item in the paint line; your margin of profit is less in that product than any product you have. As a result, a difference of two cents would make a difference of a profit or loss in the number of cases in selling a gallon of paint at a distant point.

Q. Do you mean to convey by your answer that that two cents' difference would enable you to go seeking new customers at more distant points?

A. It would keep us from getting business if we (illegible) weren't competitive at those points."

739 The same witness testified that a difference in cost of two cents per gallon on outside white paint in normal times:

"would represent the difference between a profit and a loss on a gallon of paint" (Tr. 1452).

The same witness stated as follows later in his cross-examination by respondent's counsel (Tr. 1458-59):

"Q. Now, is it your concept that for a 2¢ per gallon savings in price a distributor or a retailer is going to switch from one product to another?

A. No, I wouldn't say he would switch for 2¢ a gallon, but he wouldn't be able to get some business if he was higher priced than his competitors in that area.

Q. And you are not selling to the public, are you, you are selling to retailers and distributors?

A. Distributors, yes.

Q. So that the retailer or distributor wouldn't switch from one line of paint to yours for a 2¢ a gallon saving?

A. I couldn't answer that.

Q. Well, you have already said "no"?

A. Well, normally I would say "no", that is right.

Q. Would a 3¢ per gallon savings cause a retailer or distributor to switch from one line of outside white to another?

A. No.

Q. Would 4¢?

A. It would get him thinking, and at 4¢, possibly he would be on the fence at 4.

Q. At 5¢?

A. I would say that 5¢ would be the difference of getting it and not getting it.

Q. 5¢ per gallon?
A. Yes.
Q. Now, would 3¢ make that difference if it were a saving just in outside white and wouldn't affect the whole line of the manufacturer?
740 A. It would have quite a bearing on it, in view of the fact that outside white paint is the main item in any paint line and you must be competitive in that field in order to sell the rest of your line. It is the first thing that a customer wants to know, is how much is your outside white, what is the formula; and that oftentimes makes the difference of whether you sell him your complete line or not."

The differentials between zones on keg products do not reflect the differing costs of doing business in the zone areas, even on an average transaction basis as distinguished from a comparison of individual transactions, and it is concluded that the zones were adopted and have been utilized by the respondents as a convenient method of matching prices on a common basis rather than in any attempt to reflect accurately the differences in cost of doing business with customers in such territories.

In selling and shipping white lead-in-oil into Dallas, Texas, from its St. Louis plant National adds to the par zone delivered quotation the sum of 75¢ per hundred pounds, yet the carload freight rate from its St. Louis plant to its Dallas warehouse is only 46¢ per hundred pounds. Customers in Dallas are thus required to pay a "freight differential" nearly twice the actual freight rate from St. Louis to Dallas on account of their location in the Texas zone, yet National is perfectly willing to and does ship and sell white lead-in-oil from its various shipping points into other localities in the par zone, where no premium is added, and which involve higher freight rates than that to Dallas from St. Louis (CX 751).

Respondent National offered some evidence to show that, on an average basis and taken for each of its selling branches separately, the zone differentials reflect average differences in freight costs in doing business as between the zones. Thus, it was shown that as to 1941 sales of white lead-in-oil in the Philadelphia Branch that average freight and cartage in the par zone was $.197, in the plus 12½¢ zone, $.495; and in the plus 37½¢ zone, $.808 (RX 166). By the same token, National computes its 1941 average freight and cartage of white lead-in-oil in the St. Louis Branch at fig-

ures running from $.206 in the par zone to $1.723 in the $1.00 zone.

In view of the relationship that exists between the costs of transporting lead pigments from shipping point to customer and the net realized price to the producer, it would not appear proper to so lump together their average freight costs, disregarding the discriminations which result against particular customers who are located in and around the producing points and from whom the respondents exact the highest net price. That average costs of shipping to customers over an area of a score or more states amounts to some arbitrary figure would not appear to justify exacting such amount in the form of a higher net price from those customers located in and around the producing points.

The conclusion is inescapable that the zone delivered price quotations are not in fact prices but are simply a means whereby the respondents may nullify any advantage, one over the other, in their location as to any market. Respondent's Exhibits 199 and 200 are maps prepared by Sherwin-Williams purporting to show, on the basis
741 of published rail tariffs, the areas surrounding each producing plant in which that plant would have a freight rate advantage over any other plant. Examining Respondent's Exhibit 200, which relates to red lead, it will be seen that each of the respondents has some territory within which it has an advantage, except that Glidden and Sherwin-Williams are located in Chicago where National also has a plant so that in the territory including northwest Ohio, portions of Indiana, Illinois, Iowa, Nebraska, North and South Dakota, and in Minnesota, Wisconsin and Michigan the three producers share an advantage over other plants.

It is concluded that the discriminations as practiced in the zone method are for the purpose of nullifying and neutralizing, on a reciprocal basis, these advantages or disadvantages of location with reference to the various markets.

There is one additional practice of discrimination, with differing prices to different classes of competing customers, which was only practiced by respondent National. National received and accepted 1¢ per pound more for white lead-in-oil from customers it classified as "dealers" than from customers classified as "agents". The record shows that dealers and agents are generally in the same business—i. e., hardware stores, lumber yards and the like, engaged

in resale to painters and consumers of paint and allied products. It was testified by Fred McCarthy, the manager of trade sales of National, that even the favored customers —the agents—complained that the margin between the agent price and the resale price was too low to permit a reasonable margin of profits by the agents, and that white lead-in-oil was known in the trade as a low margin product (Tr. 3005-6). The further shrinkage of this margin to the dealer customers by National is one which necessarily may be substantially to lessen competition on the part of the dealer customers, based on the admissions of this witness.

VI. Effects of the Respondents' Practices.

The effects of the respondents' practices as set forth above in fixing and maintaining prices, terms and conditions of sale pursuant to combination, agreement and planned common course of action have been to deprive the public and customers of the respondents of the benefits of free and open competition between them, and to maintain the prices of lead pigments at levels above those that would prevail were it not for such combination, agreement and planned common course of action. Through and pursuant to such practices customers in many areas have been, and are, required to pay substantial arbitrary and unwarranted sums to the respondents in order that the respondents may maintain and operate the zone systems of selling and other practices adopted by collusion and agreement for their mutual benefit.

The effects of the respondents' practices as set forth above in discriminating in price between various purchasers, depending upon the location or the quantity in which such purchasers buy have been and are to injure, suppress and destroy competition in price between and among the respondents themselves, and to injure, suppress and destroy competition between and among such purchasers from the respondents. Inherent in use of the zone method of quoting identical delivered prices by the re-
742 spondents is a systematic discrimination against those customers located near respondents' producing plants and in favor of those customers at a distance. By this means respondents have deprived their nearby customers of the natural benefit of their locations near the respondents' plants and prevented such customers from competing with those located at a distance. The effects of the zone systems thus employed are magnified and increased by the arbitrary and unjustified differences in prices at which red

lead and litharge are quoted and sold to purchasers classified as carload, 5-ton and less-than-5-ton purchasers, which have the further effect of placing at a competitive disadvantage small purchasers of such products, many of whom are located in the same cities as respondents' producing plants.

The effect of National's practice of acquiring, and seeking to acquire, the capital stock, physical properties and assets of competing enterprises has been to give it a position of such dominance in the lead pigments industry that any further acquisition or increase in its relative size in the industry would doubtless deprive the remaining producers of any further freedom of action in marketing lead pigments.

VIII. Conclusions and Recommendations.

It is concluded that the respondents have been and (except for Anaconda and International) still are engaged in unfair methods of competition and unfair practices within the meaning of Section 5 of the Federal Trade Commission Act through their combination, conspiracy, agreements, understandings and planned common courses of action to fix, maintain and impose prices, terms and conditions of sale and suppress competition in the marketing of lead pigments, as more fully set forth in Parts III and IV hereof; that respondent National has been and is now engaged in unfair methods of competition and unfair practices within the meaning of Section 5 of the Federal Trade Commission Act through its practice of acquiring and seeking to acquire ownership or control of the business and properties of competitors engaged in production or sale of lead pigments; and that the respondents herein have been and (except for Anaconda and International) still are discriminating in price, in the course of their business in commerce, in violation of Section 2(a) of the Clayton Act, as amended, as more fully set forth in Part V hereof.

Wherefore it is respectfully urged that the Trial Examiner recommend to the Commission pursuant to Rule 22(a) of the Rules of Practice that it enter findings and conclusions as set forth above, together with appropriate form of order to cease and desist from the practices in violation of laws as set forth above.

Jos. S. Wright,
Assistant General Counsel.

December 29, 1947.

772 BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

(Received May 7, 1948.)

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their attorneys, Edmund P. Wood and Richard Serviss, and pursuant to the invitation of the Trial Examiner at the hearing on January 7, 1948, request these further findings of fact specific to those respondents as part of Paragraph 2 of the proposed findings of fact submitted by Eagle-Picher on January 29, 1947.

(g) Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, President of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices or terms or conditions of sale of lead pigments, and this testimony is uncontradicted.

773 (h) The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect.

(i) The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect.

(j) No lead pigment customer of Eagle-Picher has knowingly received the benefit of discrimination from Eagle-Picher which injured, destroyed or prevented competition and the record does not purport to evidence a single specific instance of such effect.

(k) The record shows that Eagle-Picher followed the pricing practices and policies of the National Lead Company from 1934 on with but a single exception—that in

some instances Eagle-Picher did not follow certain quantity allowances as to white lead-in-oil sold direct to painters, a very minor part of the business in white lead-in-oil.

4. Basis for Proposed Findings.

The proposed finding, 2-g, is predicated upon the negative aspects of the record as a whole, and upon the testimony of Mr. Bowlby, page 3636, line 15, through page 3637, line 16, which reads as follows:

774 "Q. And when you became president of the company in September, 1941, did you further familiarize yourself with competitive policies?

A. I have, since becoming president, kept myself informed on competitive policies of the various divisions.

Q. What was your purpose in familiarizing yourself with those policies?

A. Something that is obviously necessary to an understanding of the business and the establishment of other general policies which are dependent upon the competitive position of the company.

Q. Now, did you at any time find any agreements or understandings between your company and National Lead Company, or any of the other companies engaged in the sale of lead pigments, affecting prices or terms or conditions of sale?

A. No, I never found any such agreements.

Q. At the time you became president of the company, were you concerned in any respect as to whether such agreements existed or not?

A. No, I don't believe it ever crossed my mind that such agreements might exist.

Q. If you had found any such agreements, what would have been your policy in respect to them?

A. Well, I certainly would have looked into their propriety, and if I had found that there were any improper agreements of that nature in existence, I would have taken the necessary steps to terminate them."

The findings, 2-h, i, and j, are based upon the negative aspects of both the record and the Proposed Findings of Fact filed by the attorneys for the Commission on December 29, 1947. Neither suggests any specific instance of alleged substantial lessening, injury, destruction, or prevention of competition by Eagle-Picher's pricing policy. No instance is cited or relied upon by the Commission.

Since the proposed findings are negative, there can be no specific citation to the record, which, as a whole, is barren of what ought to be there, if the Commission is to succeed in this action.

775 Eagle-Picher's proposed finding, 2-k, is copies from Page 29 of the Commission's Proposed Findings and Conclusions, and is a facsimile of the first sentence of the last paragraph on that page.

5. Counsel for Eagle-Picher respectfully request that the Trial Examiner pass upon Eagle-Picher's proposed findings, 2-a through 2-k, under the provisions of the Administrative Procedure Act.

6. Argument.

a. Eagle-Picher Has Followed National's Pricing Policy Without Agreement.

The Findings of Fact proposed on behalf of the Commission in part follow the theory stated by counsel for the Commission at the conclusion of its case:

"* * * In other words, that paragraph (Seven B) charges a combination and a conspiracy between and among the various respondents, not individual conspiracies each with National.

* * * Now as to the specific dates and acts, I believe it is plain from the proof which has been offered in this case exactly the period of the conspiracy which is covered by it. Certainly the evidence introduced in the form of documentary evidence covering the activities of the respondents shows the conspiracy which is the subject of this complaint to be one which was initiated sometime around the year 1933, and which we contend has been in existence from that time until the present.

* * * It is my theory of this case that all of the respondents were engaged in a conspiracy to do the acts which are set forth in Paragraph Seven-B of Count I, and it was a conspiracy by and with each other and for the benefit of all of the alleged conspirators." (R. 2088, 2089.)

As to Eagle-Picher, counsel for the Commission has altered his position critically, in that he now asks the Trial Examiner to find, not that Eagle-Picher has an agreement or understanding with the other respondents herein, but

that Eagle-Picher has been following National's pricing
776 policy. The latter position is the correct one, and hence, Eagle-Picher has adopted the Commission's phraseology on page 29 of its Proposed Findings, and is requesting that finding as its own finding, 2-k.

The record does not even suggest that Eagle-Picher's pricing policies have at any time been influenced by those of any respondent other than National, and Eagle-Picher has at all times conceded that it followed National. But following is not the equivalent of agreement to follow, and while agreement is one of several possible inferences from a parallel course of conduct, it is by no means the only one, nor is it obligatory. Mr. Bowlby, President of Eagle-Picher, testified in no uncertain terms, under oath, not only that Eagle-Picher did follow National, but that there were no agreements between Eagle-Picher and National or others affecting prices or terms or conditions of the sale of lead pigments. It is respectfully submitted that the evidence in this case does not compel an inference of agreement, and that to do so, it would have to be overwhelming, which it is not. The technicalities of evidence apart, the responsible head of a national corporation should not be constructively adjudged a perjurer, except where the weight of the adverse evidence positively requires the conclusion. In this case it does not, as counsel for the Commission spontaneously recognized in requesting his finding that Eagle-Picher followed National in its pricing policy.

Further, the Commi sion alleged in its complaint, Paragraph Seven-B, that Eagle-Picher was too comparatively weak to be more than "ostensibly independent". The record as a whole tends to confirm this allegation of the complaint, and the Eagle-Picher witnesses have admitted that the company cannot price most of its products independently. The only thing which can be said against Eagle-
Picher is that it has not taken the initiative in altering
777 pricing methods and practices adopted at about the time alleged by the Commission, that is, during the N. R. A. period. Only National could or can do that, and if the Commission has made out the case it asserted in its complaint, namely, that National's policy has not only been monopolistic, but successfully so, then no blame attaches to Eagle-Picher for not attempting the impossible and it is superfluous to infer any sort of agreement by Eagle-Picher.

b. Eagle-Picher Has Acted in Good Faith, Competing Where Possible, Conforming Where Necessary.

Eagle-Picher refuted the avermant in Paragraph Twelve of the complaint, that "respondents' acts, practices, pricing methods, systems, devices and policies * * * have actually hindered, frustrated, suppressed and eliminated competition * * *". Eagle-Picher proved that it has at all times been actively and aggressively competing with National, by conducting extensive research to differentiate its products from National's and to secure the greatest consumer acceptance and utilization of its new products, which are for the most part chemically equivalent to National's, but superior in physical properties and in their adaptability to the specific problems peculiar to the individual customer. Eagle-Picher's testimony establishes uncontestably that it is competing in good faith with National by the only means available to it. No other means is possible, according to the Commission's own theory of this case.

There is and can be no charge that Eagle-Picher adopted pricing policies which it now follows in 1933-34 in anything but good faith. The record shows that National, or at least its president, did not believe that the N. R. A. was legal, so National may have been collaborating under coercion with its tongue in its cheek, but there is no evidence
778 that the Eagle-Picher executives did not follow the directives of the White House and its boisterous subordinates without a qualm of doubt. True, the zone system for white lead in oil and consignment selling were discussed, but omitted from the codes, because some companies, such as Sherwin-Williams, preferred different selling methods, and did not choose to bind themselves, but Eagle-Picher's choice of following National's practices was not only in accord with the spirit of the N. R. A. days, but compelled by Eagle-Picher's relative position in the industry. The standardization of selling practices to eliminate chiseling and price cutting was the objective of the codes, and the conduct of the docile, if gullible, conformers should be judged only against the background of that time, in so far as good faith or bad faith is concerned. Eagle-Picher commenced to follow National's pricing policies in good faith during the N. R. A. period, and has continued to do so since, not by agreements, but as a matter of necessity, because it lacks the power and capacity to do otherwise.

c. Eagle-Picher Justified under Section 2-b of the Robinson-Patman Act as to Quantity Discounts.

It cannot be seriously argued that Eagle-Picher would not price itself out of the market if it failed to offer quantity discounts equal to those published by National. Hence, as to quantity discounts, Eagle-Picher is and has been meeting the equally low price of National in good faith.

Counsel for the Commission and for Eagle-Picher have joined in requesting the finding of fact that Eagle-Picher has followed National as to pricing policies, and Eagle-Picher has adopted the Commission's proposed finding as its own 2-k. Unless the Trial Examiner chooses to reject this agreed statement of fact, it follows that Eagle-Picher's position in respect to quantity discounts is
779 completely justified under Section 2-b of the Robinson-Patman Act.

Whether the size of National's published discounts transcends the legal must be determined in respect to National alone because Eagle-Picher has had no choice but to meet the discount of its stronger competitor or price itself out of the market. It may be argued that if National's quantity discounts are illegal, then Eagle-Picher's are, too, under the doctrine of the Staley case, which held that the adoption of the unlawful pricing practice of another was no excuse for conduct otherwise illegal. But on simple analysis, the quantity discount aspect of this case is clearly distinguished from the holding of the Staley case, in which the court discussed the scope of 2-b, as follows:

"* * * But it (Section 2-b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' "

In the Staley case, the respondent was guilty of extorting phantom freight, that is, charging its neighbor in Peoria phantom freight from Chicago to Peoria, and the Supreme Court held that this had nothing to do with meeting a competitor's low price. In this regard, the Court stated:

"* * * Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, but including phantom freight in their own delivered prices.

* * * We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pric-

ing system, at least where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance * * *. But it does not follow that respondents may never absorb freight when their fac-
780 tory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

In effect, the Court held that in the Corn Products and Staley case, the extortion of phantom freight in a single basing point system was illegal per se, and that the adoption of a competitor's illegal system could not be condoned on the pretext that equally low prices were being met, because, in fact, it was equally high prices which were being met.

In the present case, in so far as quantity discounts are concerned, we are dealing solely with low prices. National publishes and has published its quantity discounts, which are available to all. Eagle-Picher must meet these low prices to stay in business, irrespective of whether National's theory of justification of them is sound or unsound legally. This aspect of the case has nothing to do with Eagle-Picher's adoption of other of National's pricing policies and is specific in National's quantity discounts and the low prices at which it thus publicly offers to sell its wares. Eagle-Picher is meeting its competitors' low prices, and nothing more.

Quantity discounts unlike extortion of phantom freight, are not illegal per se, and National's discounts are beyond criticism, unless its mathematical calculations have been faulty. In any event, Eagle-Picher has merely followed National's quantity discounts to meet National's low prices, and has had to do so blindly, regardless of the soundness of National's accounting methods, for which Eagle-Picher is in nowise responsible.

Otherwise expressed, while National may be obligated to justify its published quantity discounts under Section 2-a of the Robinson-Patman Act, Eagle-Picher has a complete defense for its quantity discounts under Section 2-b.
781 As a practical matter, if National's quantity discounts require correction, Eagle-Picher's will follow automatically, or Eagle-Picher will be proceeding at its peril,

and it is unnecessary, as well as improper, for Eagle-Picher to be a party to an order from which it is legally entitled to exemption under the express provisions of 2-b.

d. Eagle-Picher Is Justified in Following National's Delivered Price Zone Selling Unless It Is Illegal Per Se.

If delivered price zone selling is akin to extortion of phantom freight and hence, is illegal per se, then Eagle-Picher cannot defend its adoption of National's marketing system under 2-b, in view of the Staley decision. The legality of this type of selling was briefed at length in connection with Eagle-Picher's motion to dismiss, filed at the conclusion of the Commission's case.

If, on the other hand, delivered price zone selling is not illegal per se, but only National's choice of zones or premiums for zones is unjustified, then is Eagle-Picher vulnerable legally for not proceeding independently to hara-kiri economically? While the dicta of the Corn Products and Staley decisions seem to make it abundantly clear that delivered price zone selling cannot violate the provisions of the Robinson-Patman Act, still it may be the Trial Examiner's conclusion that there is not adequate legal justification for each zone and mark-up utilized in respect to each product sold. The question is whether Eagle-Picher, in adhering to National's zones, may defend under 2-b, as is clearly proper in respect to quantity differentials, or whether the Staley test extinguishes such defense. The question is a close one, because while Eagle-Picher is always meeting National's price, it is not always as clearly meeting National's low price out of par territory, as was the case in considering quantity discounts.

782 On the other hand, Eagle-Picher, in following National, did not adopt a system illegal per se, so Eagle-Picher at most would be afoul of the law only adjacent to unwarranted zone boundaries. More specifically, National has plants located in New York, Chicago, Philadelphia, and St. Louis metropolitan areas, as well as elsewhere. Eagle-Picher has the right under Section 2-b to meet National's low prices in these major marketing areas. The question is whether or not Eagle-Picher is always meeting National's low price, or just its price in the premium zones. While the wording of Section 2-b is not completely apt as to such instances, neither is the holding of the Staley decision which condemns only conduct illegal per se as unavailable for defense under 2-b.

As a matter of logic, Eagle-Picher should be permitted to meet National's price, assuming, of course, that delivered price zone, selling is not illegal per se, because Eagle-Picher has to meet National's price in order to stay in business and to prevent National from acquiring the monopoly to which it is alleged to aspire. In general, Eagle-Picher has had to absorb more freight relatively than National, because of its lessor number of plants; consequently, Eagle-Picher does not dare to exploit local situations where it has the advantage, because it is outnumbered by National's plants, and couldn't win in a price war.

Since Eagle-Picher is forced to follow National's zone pricing, Eagle-Picher itself cannot justify under 2-a; that is for National to do to the extent legally requisite. If the system is illegal only as to detail, rather than as a whole, then Eagle-Picher has not adopted a competitor's illegal system, but has merely met prices, some of which turned out to be unjustified. Under these conditions, Eagle-Picher
783 should have the benefit of absolving its pricing under 2-b.

e. The Record Establishes No Instance of Violation of Robinson-Patman by Eagle-Picher.

Section 2 of the Clayton Act, as originally adopted in 1914, prohibited price discriminations of the type intended to drive the seller's competition to the wall. This aspect of price cutting and discrimination was the main bone of contention in the original Standard Oil case, and many other teeth into the original prohibition of the Clayton Act, and The purpose of the Robinson-Patman Act was to put more teenth into the original prohibition of the Clayton Act, and to include the customers of the seller in addition to that between the seller and his own competitors, as originally provided. In the present case, there is no charge of price discrimination violative of Section 2 of the original act; on the contrary, the charge is that prices are too nearly uniform.

The charge in this case is that the pricing policies of the respondents substantially lessen competition between the customers of each individual respondent. There must be interference with competition between two customers of a specific respondent with knowledge of the discrimination by its beneficiary, in order for there to be a violation of the Robinson-Patman Act.

The findings proposed by the Commission provide respondents with absolutely nothing specific to shoot at in this regard. There is no specific finding proposed that any two identified customers of Eagle-Picher have had their competition substantially affected by Eagle-Picher's pricing policies, regardless of whether we look at it from the angle of quantity discount, delivered price selling, or the zone system.

784 Obviously, no respondent can meet the burden of disproving alleged substantial lessening of competition, except in relation to a specific case. Lack of opportunity to defend constitutes denial of due process of law. This aspect of the case was discussed in the brief filed on behalf of Eagle-Picher in support of its Motion to Dismiss the amended complaint, filed at the conclusion of the defendant's case, approximately a year ago.

In short, Eagle-Picher denies that there is a single instance in the record in this case which establishes that Eagle-Picher has violated Section 2-a of the Robinson-Patman Act, and to the extent that the Commission is attempting to try sweeping generalities, Eagle-Picher must respond with the generality that it has been following the pricing policies of National and meeting its prices, as recognized by counsel for the Commission.

7. Conclusion.

The evidence in this case is critically different from that in other adjudicated cases, after which the complaint herein was generally patterned, in four significant respects:

1. The Lead Industries Association has exercised no influence on prices or terms or conditions of sale, either directly or indirectly. This is due to the fact that the membership of the Association is made up on the one hand of mining and smelting interests which produce pig lead and sell it to respondents, and on the other hand, of users of lead pigments purchased from the respondents. The Association could not, if it wished, play the middle against the ends, that is, permit the pig lead pigment manufacturers to aggrandize their position at the expense of the other equally potent interests.

2. Eagle-Picher competes with National by every means possible, short of a price war, and while following
785 prices generally, expends large sums of money annually to differentiate its products and thus offer greater

value to customers at standard prices. This circumstance negatives the notion that the industry is moribund, or controlled to the detriment of competition and the public.

3. The respondents sell at specified and uniform delivered prices within designated zones, and collect no phantom freight.

4. No diminution of competition between any two customers of Eagle-Picher has been specifically shown factually, nor has the evidence even provided any sort of hypothetical case sufficiently crystallized as to be susceptible to rebuttal, as is requisite for te observance of due process of law.

The evidence compels the conclusion that market dominance by National, and collusion of all respondents, both of which are pleaded, are not both necessary inferences, because dominance explains the practices of the respondents fully, whereas collusion is inconsistent with Eagle-Picher's keen competition with National in developing and pushing new and different products. Moreover, National's dominant position is asserted by the Commission itself, in the complaint and in its proposed findings, but the record is negative as to joint action after the N. R. A.

Respectfully submitted,

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786 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

PROPOSAL TO TRIAL EXAMINER OF RECOMMENDED ORDER TO CEASE AND DESIST.

(Received Jan. 23, 1948.)

Comes now the attorney in support of the complaint and urges that the Examiner recommend to the Federal Trade Commission the entry of an order to cease and desist in the above matter as follows:

Recommended Order to Cease and Desist.

This proceeding having been heard by the Federal Trade Commission upon the complaint and amended complaint of the Commission, the answers of the respondents to said complaint and amended complaint, testimony and other evidence in support of and in opposition to the allegations of said complaint and amended complaint taken before an Examiner of the Commission theretofore duly designated by it, recommended decision of the Trial Examiner and exceptions thereto, briefs in support of complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and of the Clayton Act,

I. It Is Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, cooperating in, continuing or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents,
787 or between any one or more of said respondents and others not party hereto, to do or perform any of the following things:

1. Quote or sell lead pigments at prices calculated or determined pursuant to or on the basis of zone or territorial divisions as set forth with more particularity in the maps attached to and made a part of the findings of fact (Part III) hereof, or in accordance with any other plan, system, or formula which produces identical delivered price quotations or prices for lead pigments by respondents using such plan, system, or formula.

2. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

3. Quote or sell red lead and litharge at specified differentials over any particular quotation or particular quotations of pig lead prices.

4. Quote or sell lead pigments at specified price differentials depending upon size or type of container; or upon size or type of shipment to customers; or upon the type of business in which customers may be engaged.

5. Enter into, employ or continue consignment or agency contracts or arrangements whereby prices and selling practices of dealers or distributors are controlled or directed (except that this provision shall not apply to respondents The Sherwin-Williams Company and The Glidden Company).

II. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, from acting individually, or otherwise, so as knowingly to contribute to the accomplishment of any of the acts, practices or things listed in paragraphs numbered 1 through 5 of Section I of this order, and hereinbefore forbidden.

788 III. It Is Further Ordered that respondent National Lead Company, its officers, representatives, agents, and employees, in or in connection with the manufacture, sale, or distribution of lead pigments in "commerce", as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from acquiring or seeking to acquire, directly or indirectly, by means of any corporate or other device, any interest of ownership or control in the

physical assets, plants or other properties, or in the capital stock of any concern or enterprise which is now or at the time of such acquisition or proposed acquisition may be a competitor of said National Lead Company in the manufacture, sale, or distribution of lead pigments.

IV. It Is Further Ordered that each of the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, directly or indirectly, in connection with the offering for sale, sale, or distribution of lead pigments in commerce, between and among the several states of the United States and in the District of Columbia, do forthwith cease and desist from:

1. Discriminating in price through doing any of the following things for the purpose or with the effect of systematically matching delivered price quotations with other of said respondents, or of producing the equivalent of such matched delivered price quotations through or in connection with systematic discriminations in net shipping point prices received on sales to different purchasers:

(a) Selling lead pigments at prices calculated or determined pursuant to, or in accordance with the zone, delivered-price system.

(b) Selling lead pigments at net shipping point prices which systematically differ by differences in the amount of transportation involved in shipping to such purchasers.

(c) Selling at prices derived by adding to shipping point prices arbitrary sums in lieu of transportation charges which do not reflect substantially the actual differences in charges involved in shipping to such purchasers.

789 2. Discriminating in price between different purchasers of dry red lead and litharge by selling such products of like grade and quality at prices which differ depending upon the quantity ordered or to be delivered to such customers at one time.

3. Discriminating in price as between purchasers of lead pigments of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which customers or respondents are engaged, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination.

Provided, however, that nothing herein contained in Section IV of this order shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; and provided further, that nothing herein contained shall, with respect to any discrimination subsequent to this order or with respect to any charge of violation of this Section IV of this order, prevent a seller-respondent from rebutting a prima-facie case of violation by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet a low price of a competitor, or the services or facilities furnished by a competitor.

Respectfully submitted,
Joseph S. Wright,
Assistant General Counsel.

January 22, 1948.

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796 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

TRIAL EXAMINER'S RULINGS ON PROPOSALS FOR FINDINGS AND CONCLUSIONS SUBMITTED BY COUNSEL.

Counsel in support of the complaint and counsel for all respondents submitted proposed findings and conclusions under Rule XXI of the Commission's Rules of Practice. These are contained in the record and are specified below in connection with the ruling on each proposal. In each case the ruling applies to the proposal and not to the reasons stated therewith. The proposals allowed are deemed to be established by the greater weight of the evidence and are considered in connection with the recommended decision, but are not necessarily incorporated verbatim therein. Many of the denied proposals are taken in substance or in modified form as appears in the recommended decision. In case of conflict or discrepancy between these rulings and the recommended decision, the latter should be taken as correct. The term "Report" will be used hereafter to

specify the Trial Examiner's "Report Upon The Evidence" or to other portions of the recommended decision. In making these rulings due consideration was given to arguments and replies to proposals.

To the proposals of Anaconda, the following rulings are made:

Paragraph 1 is allowed. Paragraph 2 is denied for the reason that Anaconda did engage in the manufacture
797 and sale of lead pigments through its wholly owned and controlled subsidiary. Paragraphs 3 and 4 are allowed. Paragraph 5 as stated is denied, but the facts are as shown in the Report. Conclusions of law 1, 2, 3, and 4 as stated are denied for reasons appearing in the report. Conclusion 5 is denied on the authority of the cases cited in view of the evidence showing direct supervision and control of International by Anaconda. The relation is such as to render the parent company responsible for any of the infractions proven against the subsidiary in this action. Conclusions 6, 7, 8, and 9 as stated are denied in all respects not otherwise appearing in the Report.

On International's proposals the rulings are as follows:

Paragraphs 1 through 15 are allowed. Paragraph 16 as stated is denied, since the evidence shows that competitors' prices were otherwise obtained. Paragraph 17 is allowed as modified in the Report; Paragraphs 18 and 19 are allowed. Paragraphs 20, 21, and 22 are denied as stated. Paragraph 23 is allowed with the reservation that it does not state all of its sources of price information. Paragraph 24 is denied except as shown in the Report. Paragraph 25 is denied, as the last statement (following the comma) is too broad. Paragraph 26 is allowed. Paragraph 27 is modified by specifying "delivered prices", and allowed as modified. Paragraphs 28, and 29 as stated are denied in all particulars not included in the Report. Paragraph 30 is denied as stated. Paragraph 31 as stated is denied. Paragraph 32 as stated is denied. Conclusion 1 is denied. The amended complaint in this proceeding was filed on April 12, 1946, and the effective date for procedural requirements under the Act did not obtain until December 11, 1946. The Act exempts all actions initiated prior to the last-named date. However, the proceeding is subject to the requirements of the Commission's Rules of Practice, which anticipated several features of the Procedural Act. The Trial Examiner's statement that he

would conduct hearings and receive evidence in conformity to the requirements of the Procedure Act was not advanced as a conclusion or ruling on the law. There was no objection to the statement and, as a matter of fact, we have followed the Act very closely, if not in all respects. Conclusion 2 is denied. Conclusion 3 is denied. Conclusion 4 is denied. Conclusions 5, 6, 7, and 8 as stated are denied except as appears in substance in the Report, which reflects acceptance of many of the proposals and arguments of Anaconda's and International's counsel.

798 On Eagle-Picher's proposals, other than those it adopts in National's proposals, the following rulings are made:

Paragraph 2, subparagraphs (a) through (c) are denied except as shown in the Report. Paragraph 2(d), (e), and (f) are denied as contrary to the weight of the evidence. Paragraph 3 is denied. Rulings on the adopted proposals appear in rulings on National's proposals.

To Eagle-Picher's supplemental proposals the following rulings are made:

Paragraphs (g) through (j) are denied; Paragraph (k) is allowed. Paragraph 5 (page 4): the request is allowed. Some of the counsel's arguments in Paragraph 6 have been well taken, as appears in the Report. Conclusions 1 through 4 are denied except as shown in the Report. The contention of meeting the "equally low price of a competitor" in connection with the discriminations found in this case, cannot be supported by an affirmative finding, for such differences as were shown were pursuant to a general plan followed by each respondent through a number of years. In such circumstances, the good faith clause could not reasonably be invoked.

On Glidden's proposals, the following rulings are made:

Paragraph 1, covering the adoption of National's proposals, Paragraphs 1 through 9, 20 through 88, 91 through 96, and 98 through 103, the rulings are as stated as to each of these paragraphs of National's proposals. Paragraph 2 as stated is denied, except as stated and qualified in the Report. Paragraph 3 as stated is denied as contrary to evidence given by Glidden officials. Paragraph 4 is denied as stated. Paragraphs 5, 6, 7, 8, 9, and 10 are allowed except as to Glidden's method of determining competing prices. Paragraph 11 as stated is denied because it does not state all of its sources of information as shown by the evidence.

Paragraph 12 is allowed. Paragraph 13 is denied except as shown in the Report. The adopted paragraphs will be ruled on elsewhere. Paragraphs 14 and 15 are denied as not 799 clearly reflecting the situation. Paragraph 16 is denied as contrary to the evidence respecting a number of cases and locations. Paragraph 17 is allowed. Paragraph 18 is allowed. Paragraphs 19 and 20 are allowed. Paragraphs 21, 22, 23, 24, and 25 are allowed. Paragraph 26 as stated is denied. The evidence shows some competition for orders, but it is not clear that there was "keen" price competition. And it is not clear that competition from non-lead pigments was particularly strong. Paragraph 27 is denied as irrelevant in the absence of evidence that the agreed "differential" was different from that reflected in prices made by other respondents. Paragraph 28 is denied for the reason that the term "competition" is here used in a different sense than that involved in the issues. The cost to the battery manufacturer of making oxides for his own use is a price limitation on the sellers, and this was shown by the evidence. Paragraph 29 is allowed. Paragraph 30, as stated, is denied, except as shown in the Report. Paragraph 31 is allowed with the substitution of "believes" for "has found" in line 3 from the bottom. Paragraph 32 is denied except that which has been modified and accepted in principle in the Report. Paragraph 33, as stated, is denied except as stated in the Report. Paragraph 34 is denied for the reason that the evidence does not show all of the features as stated. The proposal is rejected as a whole, but some features are accepted in principle in the Report. Paragraph 35 is denied as contrary to the evidence showing that Glidden did sell under the card prices on occasion. The proposal cannot be accepted verbatim, but the relevant points are covered in the Report. Conclusions of Law: Paragraph 1 is allowed. Paragraphs 2, 3, 4, 5, 6, 7, and 8 are denied except as modified and more fully stated in the Recommended Decision.

Rulings on further proposals of Glidden:

Paragraph 36 is allowed. Paragraph 37 is allowed. Paragraph 38 is allowed. Paragraph 39 is denied. Paragraph 40 is denied as stated. This matter was not the subject of factual evidence, and a satisfactory finding could not be made that would go as far as this proposal. Paragraph 41 is allowed. Paragraph 42 is denied. The counsel's arguments on his supplemental proposals on pages 2 and 3 are

well taken and have prevailed to a considerable extent, as shown by the Report.

800 To the proposals of Sherwin-Williams the following rulings are entered:

Count I: Paragraphs 1 and 2 are denied. Paragraph 5 is allowed except as to the term "negligible" and as to all transactions being intra-state. The record shows that Sherwin sold inter-state. Paragraphs 6 and 7 are denied except as shown in the Report and except the proposals on page 14 as to consignments and relations with du Pont. These are allowed and reflected in the Report. Paragraph 8 is denied as stated in the several items and except as shown in the Report. Paragraph 9 is denied as stated, but is taken in part as shown in the Report. Paragraph 10 is denied as stated. Paragraph 11 is denied except as shown in the report. Paragraph 12 is denied.

Count II: Paragraphs 1 through 5 are denied except as shown in the Report. Paragraph 6 is denied. Paragraphs 7 and 8 are denied except as shown in the Report. Paragraphs 9 through 14 are denied to the extent not shown in the Report.

Conclusions of Law: Paragraph 1 is allowed as applying to a large portion of its business but not to all, but the evidence is sufficient to show that Sherwin is in commerce as defined and is therefore subject to the Acts specified. Paragraph 2 is denied as not being a sufficient statement of the law on this point. Paragraph 3 is denied for reasons fully stated in the conclusion of law on this point contained in the Report, Paragraph 7-d1. Paragraph 4 is allowed so far as it relates to the intra-zone selling involved in this case (See Paragraph 11-c). Paragraph 5 is allowed to the extent the principles are applied in the report (Id). Paragraphs 6 and 7 are denied. Paragraphs 8 and 9 are denied. Many of the counsel's contentions and arguments are well taken and are reflected in the Report.

To the proposals of National the following rulings are made:

Paragraphs 1 through 9 are allowed, except as to any variations in production figures which the Report contains. Paragraph 10 is allowed except that Anaconda is held as being in the lead pigment business through its controlled subsidiaries. Paragraphs 11 and 12 are allowed. Paragraphs 13 and 14 are denied. Paragraph 15 is allowed. Paragraphs 16 and 17 are denied except as to such por-

tions as are contained in the report. Paragraph 18 801 is denied except as to such portions of it as are used in the Report. Paragraph 19 is denied. Paragraphs 20 through 23 are allowed. Paragraph 24 is denied for the reason that the evidence does not justify the positive and conclusive finding proposed. Paragraph 25 is allowed. Paragraph 26 is denied as to Anaconda's non-participation in Code proceedings. The remainder is allowed, as stated in the Report. Paragraph 27 is denied as stated. Paragraph 28 is allowed. Paragraphs 30 through 33 are allowed, but few of the statements appear to be relevant. Paragraphs 34 to 40, re the "agency" plan, are denied except as to the considerable portion contained in the Report. Paragraph 41 is denied as contrary to the evidence. Paragraph 42 is allowed in the sense that no unanimous conclusion as to the agency plan was reached. Paragraph 43 is allowed. Paragraph 44 is denied except as stated in the Report. Paragraphs 45, 46, and 47 are allowed. Paragraph 48 is denied as a categorical finding. Paragraph 49 is denied except as shown in the Report. Paragraphs 51 and 52 are substantially correct but are denied as a verbatim finding. Paragraph 52 is denied except as the term "agreement" may be confined to agreement to include in the supplemental Code. Paragraphs 53, 54, and 55 are allowed. Paragraph 56 is denied as stated. Paragraph 57 is denied for reasons appearing in the Report. Paragraphs 58 and 59 are allowed. Paragraphs 60 and 61 are denied. Paragraphs 62, 63, are denied as stated. Paragraph 65 is denied as stated. Paragraphs 66 and 67 are denied. Paragraph 68 is denied. Paragraphs 69 and 70 are allowed. Paragraph 71 is denied. Paragraphs 72, 73, 74, and 75 are allowed. Paragraph 76 is denied except as shown in the Report. Paragraph 77, 78, and 79 are allowed. Paragraph 80 is denied except as shown in the Report. Paragraphs 81, 82, 83 are allowed except that paint manufacturers should be included in Paragraph 83. Paragraph 84 is denied. Paragraph 85 asks for a general conclusion of law and does not state factual or legal bases. Sales to the government in this case do not appear to be in violation of Section 2(a) of the Clayton Act. Paragraphs 86 and 88 are denied. Paragraph 87 is allowed as shown in the Report. Paragraphs 89 through 96 are denied except as stated in the report. Paragraph 97 is denied. Paragraphs 98 through 101 are allowed. Paragraphs 102 and 103 are denied. Paragraph 104 is denied as stated, as it is not

clearly confined to shipments within a particular zone to points therein. Paragraphs 105 through 108 are denied.

802 Conclusions of Law: Paragraph 1 is denied except as explained in the ruling on this proposal made by International. Paragraph 2 is denied. Paragraph 3 is denied for reasons stated in the report. Paragraph 4 is denied except as stated in the report. Paragraphs 5 and 6 are denied. Paragraph 7 is denied on the basis of the entire record, which reveals substantial public interest in the proceeding. Paragraph 8 is denied. Under Reason 19 on pages 49 and 50, counsel contend that sufficient time was not allowed for preparing proposals. In view of the fact that all counsel were advised several weeks before the case was closed that much of the details of this work could be prepared in advance and in the further consideration that the time for filing supplementary proposals was extended to January 25, 1948, and that proposals and exceptions may yet be filed before the Commission, I am of the opinion that Section 8(b) of the Administrative Procedure Act and the Commission's Rule XXI have been fully complied with on this point.

As the report will show, many of the reasons and arguments of respondent National's counsel have been well taken and have prevailed in essential particulars.

To the proposals filed by the complainant's counsel the following rulings are made:

Part I on pages 1 to 10 relating to parties and products is allowed except as may be modified and stated in the report. Part II, pages 10 through 12, is allowed as applying to conditions and practices prior to 1933. Part III, page 12, the first 3 paragraphs are allowed. The evidence cited from pages 13 through the first paragraph and quotation on page 22 is not in the form of proposed findings, but is taken in part and made the bases for findings in the report. Part III, page 22, second paragraph, which relates to Anaconda, is denied except as shown in the report. The remainder of page 22 and through page 25 is denied as not being in such form as to permit of specific rulings. Page 25 is allowed in principle and as reflected in the report. Pages 26 through 28 down to Part IV are denied except as to such portions as are reflected in the report. Part IV, pages 28 through 32, is denied as a verbatim finding except as to recitals of evidence, and except as to portions reflected in the report. Part V, the

803 statements on pages 33 through 41 down to Part VI are denied as stated, except as shown in the report. Part VI, pages 41 and 42, the first paragraph is denied except as modified and used in the report. Paragraph 2 is denied as stated. Paragraph 3 is denied as stated. Paragraph 4 is allowed. Part VII is allowed in substance and as stated in the report, which reflects acceptance of many of the counsel's proposals, contentions, and arguments. Complainant's proposed order is allowed in part and denied in part as appears in the report. Paragraph III of the proposed order is denied as unreasonably restrictive and beyond the scope of the Commission's authority.

Transmitted to the Division of Legal Records, with a copy for each party, on this, the 31st day of March, 1948.

John W. Norwood,
Trial Examiner.

JWN:ib

806 BEFORE FEDERAL TRADE COMMISSION.

(Caption—5253)

Before:

Mr. John Norwood, Trial Examiner.
Mr. Joseph S. Wright and Mr. Paul R. Dixon, Attorneys in support of the complaint;
Mr. James D. Ewing and Mr. Eugene Z. DuBose, of Alexander & Green, 120 Broadway, New York, N. Y.,
Mr. Henry E. Gardiner, of Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.,
Mr. Edmund P. Wood, of Wood, Arey, Herron & Evans, Carew Tower, Cincinnati, Ohio,
Mr. Richard Serviss, American Bldg., Cincinnati, Ohio,
Mr. John A. Duncan, M. B. & H. H. Johnson, Union Commerce Bldg., Cleveland, Ohio,
Mr. Roger Hinds, Strange, Myers, Hinds & Wight, 165 Broadway, New York, N. Y.,
Mr. James T. Welch of Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth St., Washington, D. C., and
Mr. Thomas J. McDowell, 101 Prospect Avenue, N. W., Cleveland, Ohio,
Attorneys for the respondents.

Trial Examiner's Recommended Decision.

I. Proceedings.

This is a proceeding before the Federal Trade Commission on an amended complaint duly issued on the 12th day of April, 1946, charging the respondents named herein with effecting monopoly, lessening competition, and restraining trade, as hereinafter set out, in violation of the Federal Trade Commission Act (38 Stat. 717; 15 U. S. C. A., Sec. 41; 52 Stat. 111), and with price discrimination in violation of the Clayton Act, as amended by
807 the Robinson-Patman Act (38 Stat. 730; 15 U. S. C. A., Sec. 12; 49 Stat. 1526; 15 U. S. C. A. Sec. 13, as amended.

The original complaint was filed on the 25th day of November, 1944. Answers were duly filed thereto, and the case was duly assigned to Trial Examiner Webster Ballinger, who held hearings at various times from January 15, 1945, to May 16, 1945, as shown by the record (Tr. 1-523).

On April 12, 1946, the amended complaint was filed and answers thereto were duly filed thereafter. On May 16, 1946, Trial Examiner James A. Purcell was assigned to the case but was prevented by illness from holding hearings. Counsel in support of the complaint and counsel for respondents stipulated that evidence received under the original complaint, except the testimony of J. B. Wilson and H. E. White, could be considered as part of the record under the amended complaint, and that the evidence received by Trial Examiner Ballinger would be considered as if received by Trial Examiner Purcell (Tr. 529, 531). On June 12, 1946, John W. Norwood, Assistant Chief Trial Examiner, was designated to act as Trial Examiner and complete the case in the place and stead of Trial Examiner Purcell. This substitution was agreed to by all counsel (Tr. 532, 533).

Further hearings were held on June 17, 1946, and thereafter as appears in the record.

On the 20th day of November, 1947, reception of evidence was concluded and the Trial Examiner fixed December 1, 1947, as the time for filing proposed findings and conclusions under Rule XXI. The Commission thereafter vacated the Trial Examiner's order and extended the time for filing said proposals to December 29, 1947. Proposals were thereupon duly filed by all parties, and the same, together with the Trial Examiner's ruling on each such proposal, are included in the record. Arguments were heard by the Trial Examiner on January 7th and 12th, 1948, as appears in the record on page 4209, et seq.

The case was closed on the last-named date, and the complete transcript and all exhibits were received by the Trial Examiner on the 21st day of January, 1948, whereupon your Examiner submits his recommended decision as required by law.

808 II. Pleadings and Issues.

The Complaint:

The amended complaint names National Lead Company, a corporation, hereafter termed "National", Eagle-Picher Lead Company, a corporation, and Eagle-Picher Sales Company, a corporation, either or both hereafter termed "Eagle-Picher", Anaconda Copper Mining Company, a corporation, and International Smelting & Refining Company, a corporation, either or both hereafter termed "Anaconda", The Sherwin-Williams Company, a corporation, hereafter termed "Sherwin", and The Glidden Company, a corporation, hereafter termed "Glidden", as respondents. Concerning these respondents, the complaint alleges in substance as follows:

Outline of Complaint.

Count One.

The complaint alleges in substance:

1. That National planned to monopolize the production and sale of lead pigments and to that end and effect acquired various properties, including a substantial part of the capital stock of Eagle-Picher (VI, VII);*

2. That National exerted a monopolistic influence on the pricing of pig lead through its relations with American Smelting (VIII);

3. That National contracted with E. I. du Pont de Nemours Company, Inc., hereafter termed "du Pont", for the purpose and with the effect of maintaining price levels fixed by National and primary sellers of white lead (VII-B-7);

4. That all respondents conspired and cooperated in maintaining identical or matched delivered prices on lead pigments through the employment of a zoning system by which each respondent quoted and sold (a) at a uniform base price in the "par" zone and (b) at various specified differentials in the several zones as shown on the map contained in the complaint, which uniform zone prices

* Note: Citations in this outline are to the paragraphs and subparagraphs of the complaint covering the particular charge.

and differentials were not based on differences in costs of delivery (VIII);

809 5. That respondents, through conspiracy, co-operation, and with the purposes aforesaid, pursued the following methods:

(a) Employed the Lead Industries Association in adopting and using non-competitive terms and conditions of sale and in exchanging advance price factors and information (VII-B-3, 4);

(b) Adopted and used uniform "agency" agreements to prevent price variations (VII-B-5) and required agents and dealer customers to resell at prices fixed and published by it (IX-A);

(c) Fixed and quoted uniform prices, terms, and conditions of sale (VII-B-6) and issued price cards or lists of quotations which produced matched prices with Sherwin, Anaconda, and sometimes Glidden, matched at a small differential below National and Eagle-Picher (IX-D);

(d) Quoted uniform differentials between standard containers of 75, 50, 25, and 12½ lbs. (IX-B);

(e) Made quarterly contracts for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead (IX-C).

6. The tendency and effect of the aforesaid practices were to restrain trade, suppress competition and create monopoly by (1) depriving purchasers of the natural advantage of location near sources of supply, (2) by surrendering reciprocally their own territorial advantages in order to maintain uniform delivered prices and terms, and (3) by agreeing and adhering to uniform prices, methods and policies (X, XI, XII);

7. That the foregoing acts and practices are to the prejudice of the public and in violation of the Federal Trade Commission Act (XII).

Count Two.

The complaint alleges in substance:

8. That each respondent, through the employment of the zone method, discriminated in price (a) between customers within a given zone and (b) between customers located in different zones, by charging different prices to different customers in competition with each other, which differences were not justified by differences in cost (I through X);

810 9. That each respondent discriminated between competing customers through different trade, regional, and quantity discounts (XI);

10. That these differentials lessened competition substantially in said products between (1) respondents and their competitors, and (2) between the buyers of said products competitively engaged (XIII); and

11. That the foregoing have the tendency and effect of injuring competition, restraining trade, and creating monopoly in these lines of commerce, in violation of the Clayton Act (XIV).

The Answers of all respondents deny each and every allegation and inference that they agreed or conspired to monopolize or restrain trade or collectively to employ any of the particular practices set out in the complaint.

National admits the alleged acquisition of the business, stock and assets of other concerns, but denies any purpose of effect of exerting a monopolistic influence on the price of pig lead, or restraining trade in the lead pigments industry, and of securing and exercising control of Eagle-Picher. National avers that it makes its own prices, terms, and conditions of sale based on trade and economic conditions and without regard to competition, except that of competitive substitutes for lead pigments.

The individual and independent employment of zone pricing, "agency" consignment selling, price cards, and the other particular practices alleged are, with certain variations and exceptions, admitted in the answers of National, Eagle-Picher, International, and Glidden. Sherwin denies zone pricing and the use of the consignment or "agency" plan of selling.

The answers of all but National aver that the employment of such of these practices as they did use was to meet the prices, terms, and conditions made by their competitors and which they determined from market quotations and from competitive quotations made to their customers. All respondents deny violation of the Federal Trade Commission Act.

Anaconda denies any participation in the lead pigments trade and disclaims management of and responsibility for its subsidiary International.

Respondents deny that any of the methods individually employed by them discriminate in price between customers and lessen competition as alleged, and that any of

their practices are in violation of the Clayton Act as
811 amended. They aver that the differences in price as admitted by them are no more than are justified by differences in cost of sale and delivery, or are prices made to meet the equally low prices of competitors.

The Issues:

The foregoing pleadings raise the following principal issues:

Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?

Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?

Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?

Did respondents agree to and maintain fixed and identical prices on lead pigments through the co-operative employment of the zone pricing system and the particular practices set out in Paragraph 5(a) through (e) of the outline?

Were the tendencies and effect of these practices to restrain trade, suppress competition, or create monopoly through unequal cost factors and identical delivered prices?

Did respondents' employment of the zone system as alleged involve differences in price between customers (a) located in a zone, and (b) located in different zones, which differences were more than differences in cost of sale and delivery?

Did each respondent so discriminate in price between customers through the granting of different trade, regional, and quantity discounts?

Did these differentials have the tendency and effect of lessening competition substantially (1) between respondents and their competitors and (2) between buyers competitively engaged?

The issues as outlined go to the questions of monopolistic control and tendency, conspiracy, and effects of the zone prices and discounts. The answers to these are largely matters of inference from the circumstances and manner of employment by respondents of the various particular methods admitted and shown. Consequently, the evidence of each method and charge from 1 through 6 and

8 through 10 of the outline will have to be examined
812 for features determinative of their character. The important portions of this evidence, with citations, conclusions, and discussion thereon, will be set out under parallel denotation to that of the foregoing outline. References to the transcript and exhibits are used to designate sufficient of the probative, reliable, and substantial evidence to establish the factual statements to which the citations relate. All important factual statements are based on what the Trial Examiner considers to be the greater weight of the evidence as contained in the entire record.

III. Report Upon the Evidence.

Count One.

The facts of organization, location, control, interstate commerce, and business of each respondents are shown by the record to be substantially as set out in the complaint and as appears hereafter in detail in the recommended findings.

Respondents are manufacturers (corroders) and sellers of lead pigments, which term is used throughout this proceeding as including (1) oxides, consisting of litharge and red lead, which is produced by burning litharge, (2) basic lead carbonate sold as dry white lead or lead-in-oil, and (3) basic lead sulphate, sometimes used as a substitute for basic lead carbonate. Lead oxides and basic lead carbonate are manufactured from corroding pig lead which differs from common pig lead in that it is desilverized. Basic lead sulphate is usually made from common pig lead, but can be manufactured directly from ores (Tr. 2123-6, 3386-7, 3345-52). Oxides in the form of red lead are sold dry or in oil. Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others (Complaint and answers; Tr. 2117-27).

At one time National produced pig lead, and one of its subsidiaries now produces a limited amount (CX 93). Basic lead carbonate products are produced by different processes and in different qualities or grades for different uses by paint, ceramic, and other manufacturers, and dry white lead is produced by National in 5 types, all of which are sold at the same prices and discounts and are

interchangeable for some purposes (Tr. 1073-4). Other respondents produced different qualities of these products, which they thought superior to those put out by National (Tr. 2542-3, 3581-3). Battery manufacturers preferred some brands of lead oxides over others, and some held the opinion that oxides produced by different
813 respondents are different in quality and chemical characteristics (Tr. 1736-42, 1696, 1817, 1854, 1880). For paint manufacturers the pigments made at different plants contain important differences (Tr. 3599-3602).

National's Acquisitions.

(1-a) The first charge goes directly to the purpose and effect of the admitted acquisitions by National of various lead, pigment, and oil producing properties alleged in the complaint and particularly set out in the recommended findings (See Tr. 17 to 20 and elsewhere as cited below). The acquisitions began about December 8, 1891, immediately after National's organization, and continued through 1919 and thereafter (Tr. 19, Answer). At the first meeting of the Board of Directors, December 8, 1891, the acquisition of sixteen companies previously engaged in the manufacture, sale, and distribution of white lead, linseed oil, and kindred products was approved and thereafter completed as of that date (Tr. 17, 18; CX 5-B,-C).

(1-b) In February, 1906, National acquired the United Lead Company, which had been organized in 1903 by Grant Hugh Brown, Daniel Guggenheim, and Thomas F. Ryan, and which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works, not theretofore taken over by National, and including also the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country (CX 22-P, Tr. 17-20). Most of the concerns acquired by National through the purchase of United had been offered previously to National by Messrs. Guggenheim, Ryan, and H. H. Rogers, the two first named being directors of Smelting Co. (CXs 5-B, 22-P, -V, -R; Tr. 3300). At this time, and until 1911, Smelting was given representation on National's Board of Directors through Daniel Guggenheim, Murray Guggenheim, and Edward Brush, who were also directors of Smelting (CXs 22-R, -V, 92, 180, 181; Tr. 3295. See also Tr. 3283-3302; RXs 175, 179, 180, 181).

(1-c) Thereafter National acquired the Carter White Lead Company (1906), the Matheson Lead Company (1912), the River Smelting & Refining Company (1915), the BasHunter Paint Company (1916), and the Hirst & Begley Company (1919) (Tr. 19), and in about 1944 it acquired the Evans Lead Company at Charleston, West Virginia, which continued to produce litharge and red lead to the extent of about 10% of National's production (Tr. 1625-6, 2375).

814 (1-d) Prior to these acquisitions by National, there were 18 or 20 producers of white lead who were selling in their various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged existing plants (RXs 175-A, 179-D). The names of some of the acquired properties were retained and operated by National as branches (Tr. 17-20, 1625, 2375, 2891, 2892). National thereafter controlled and operated branches and plants located in New York, N. Y.; St. Louis, Mo.; Dallas, Texas; Omaha, Neb.; Buffalo, N. Y.; Philadelphia, Pa.; Boston, Mass.; New Orleans, La.; Cincinnati, Ohio; Cleveland, Ohio; Atlanta, Ga.; Pittsburgh, Pa.; San Francisco, Calif.; and Chicago, Ill. (Tr. 13, 14, 1068, 1625, 2891-2; CX 481-A, -B).

(1-e) National's percentages of the production of the entire industry in the United States from 1936 to 1941 were estimated as follows:

White lead-in-oil	60%
Dry white lead	30% to 35%
Oxides (red lead and litharge)	50%

(Tr. 1647, 1665; CX 664). In 1943 National produced 60% of the white lead-in-oil and in 1932 it may have gone as high as 70%, but in other years the percentage varied with a downward trend (Tr. 1666). Shipments of white lead, dry and in oil, for the years 1938 through 1941 were shown to reflect the following comparative average percentages for the entire United States for the four-year period:

National	55.475%
Eagle-Picher	13.35 %
International (Anaconda)	7.625%
Fuller	3.225%
McGregor	1.2 %
Sherwin and Glidden combined	19.025%

Eagle-Picher is here shown to be National's largest potential competitor in this line, and their combined production for the years considered was 68.825% of the domestic output (CX 669; Tr. 2193), which percentage has been increased by the recent acquisition by Eagle-Picher of International's lead pigment plant and business (CX 836-P; Tr. 2035, 3545).

National's prices, terms, and conditions of sale were followed generally by all of its domestic competitors (Tr. 1280-5, 1317, 1571, 1764-5, 2640-1). National became a predominant factor in the industry (Tr. 2457) and its competitors felt compelled to follow its prices and terms (Tr. 2522-25; CXs 506-F, 650-A; Tr. 2546, 2553). National advertised its "Dutch Boy" brand and made it a standard, leader, and price criterion in the trade (Tr. 2491-5, 2499-2505). National's facilities for production were at all times adequate to satisfy the entire market demand for white lead (Tr. 2500).

National and Eagle-Picher.

(1-f) Respecting the charge that National secured substantial portions of the capital stock of Eagle-Picher, it was shown that in 1930 National acquired 4,500 shares of the common stock of Eagle-Picher and continued accumulating it until, on June 13, 1932, it owned 44,900 shares of the total 900,000 shares outstanding of common and 50 shares of preferred (Tr. 4122-3). In 1937 National sold all of this but 3,500 shares of common, and in 1944 National sold the remaining 3,500 shares. It realized a gross profit (interest on investment not considered) of $861,981.53 (Tr. 174-7, 185; CX 528; RX 700). National's secretary, Mr. Charles Simon, testified that these stock purchases were for investment, that he thinks National voted the stock but had never been represented on Eagle-Picher's Board of Directors, and that he did not know that National ever exercised any control over that company (Tr. 3304-9). It was not shown elsewhere that National controlled Eagle-Picher through stock ownership. It made an unsuccessful attempt in 1931 to purchase the assets and goodwill of Eagle-Picher (CX 866-A, -B; Tr. 4182-3).

There is some direct evidence, however, of close relations between these two respondents. Eagle-Picher's executive vice-president, Mr. W. R. Dice, in 1937, discussed policies

with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. Wormser, Secretary of the Association, had invited him (CXs 696, 697; Tr. 2203). Eagle-Picher's files contained National's price changes on the Pacific Coast, and the matter was difficult for Mr. Rowe, of National, to explain (CX 581; Tr. 1161 through 1175). In 1940 Eagle-Picher submitted labels, prices, and description of its new white lead paint to National and referred to a previous conversation about the matter over the telephone. Mr. Reque, in reply to Mr. Hayt's letter, invited him to lunch (CXs 708, 710). Mr. Chinery, Chief Chemist of Eagle-Picher (1940), wrote Mr. Rose, of National, suggesting the increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications" (CXs 691, 692). In 1941 National wired Eagle-Picher its Manila price increase for white lead-in-oil and red lead (CX 701). Other evidence of co-operation between these two is shown below in Paragraphs 4, 5, and elsewhere.

816 National's Relations With Smelting.

(2-a) Respecting the transactions between National and American Smelting & Refining Company, hereafter termed "Smelting", it was shown that the latter, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries (CX 22-D), and thereafter, in 1901, took over three smelters, one refinery, and other related properties from M. Guggenheim's Sons (CXs 22-G, 92, 498-F, -H; Tr. 2376). After these acquisitions Smelting became the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world supply of refined lead (Tr. 4093). It operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four to five hundred lead mines (Tr. 4090). Smelting purchases from the mines 80% to 90% of the lead ore which it processes, and most of its ore of United States origin is so purchased. It publishes daily the price at which it buys lead ore and the price at which it sells pig lead on the same day (Tr. 4088). Smelting's published prices on common pig lead are the New York market prices and are accepted by pigment producers as a basis for pricing their products (CXs 615, 809; RX 137).

(2-b) On February 6, 1906, at the time it acquired the United properties, National entered into a contract with Smelting by which Smelting was to sell, and National was to buy, (a) all of the latter's requirements of corroding pig lead except so much as National's Collinsville, Illinois, plant supplied not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. Smelting was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company (CX 93-A, -B). If National's Collinsville Smelting plant (the St. Louis Smelting & Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to Smelting at 5% less than the latter's prevailing price (CX 93-B, -C).

(2-c) Except for corroding lead, the price to be paid by National under this contract was to be based on the average of Smelting's lowest daily schedule prices for the month of shipment, for 50 tons or more on 30-day delivery at St. Louis and New York City respectively, provided that if this price was more than 1.075¢ per lb. above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said
817 London average plus the differential of 1.075¢, which differential was based on the prevailing tariff (CX 93-F, -G). The price for corroding lead was to be $2.00 per ton in excess of the above-named price (CX 93-G). And it was stipulated between National and counsel in support of the complaint that "the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in the finished stock is the most important single factor in its determination and fixing of its price for white lead (since pig lead is the principal material used in the manufacture of white lead)" (Tr. 20).

(2-d) Concurrently with the acquisition of United and its properties and with the foregoing contract, Smelting entered into a contract with Hoyt Metal Company, acquired by National as a property of United, whereby Hoyt was to purchase and Smelting to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. The price provisions were the same as provided in the Smelting-National contract for other than corroding lead (CX

94-A to -G). The contract contemplated deliveries of not more than 800 tons per month (CX 94-C, -D).

(2-e) The National-Smelting contract gave National control of 85% of Smelting's domestic production of pig lead of all kinds excepting the production of the Shelby Company. Smelting secured 85% of National's consumption of common pig lead and all of its requirements of corroding (or desilverized) lead, less so much chemical or other lead of other brands as National might require. The contract limited National's use of pig lead produced by its own subsidiary (The St. Louis Smelting & Refining Company) to 30,000 tons per year, thus limiting the competition with Smelting from this plant (CX 93, and supra). It also resulted in Smelting's refraining from taking any further interest in the lead manufacturing business (CX 22-Z1, -Z2). The agreement between Smelting and Hoyt (CX 94) took still more of Smelting's output by the amount of all of its production of antimonial lead (Par. 1-g). These agreements contracted the open market supply of lead in the United States considerably in excess of 32% (CX 22-Z3, -Z4). The first contract also set a fixed differential between common pig lead and corroding lead (CX 93-G).

(2-f) National's contract with Smelting expired in 1921, and the companies signed a contract of mutual release (RX 228; Tr. 4085), and made further arrangements whereby National purchased pig lead from Smelting on short term contracts at a spot price or at an average monthly price based on Smelting's daily quotations (CX 113; Tr. 4085-6, 4089). National's president, Judge Cornish, told Smelting officials that it was not necessary
818 to renew the long-term contract "because one company had more lead to sell than any other in the United States and the other company was the largest consumer of lead in the United States, and that there isn't enough lead from which National could supply its demands without buying from Smelting, and Smelting hasn't enough consumers to take all of its production unless National takes some of it"—and that "the contract had a tendency to bind them (National) and handicap their ability sometimes to buy at the lowest price" (Tr. 4084). National's manager of metal purchases submitted the following statement of purchases of common and refined lead used by this company from 1936 to 1941, inclusive:

Sellers	Tons 1936	1937	1938	1939	1940	1941
Smelting	48,422	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine LaMotte)	—	—	—	—	—	871
Bunker Hill Smelter	—	—	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro de Pasco	—	—	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	60,005
Totals	121,822	129,831	97,020	122,204	133,195	211,395

The last item (1941) is broken down as follows: Anaconda, 5,000 tons; U. S. Smelting, 2,000; American Metal Co., 8,000; C. Tenant & Sons, 45,005—total 60,005 tons. The St. Louis Smelting & Refining Works belongs to National (RXs 173, 174; Tr. 3272-7).

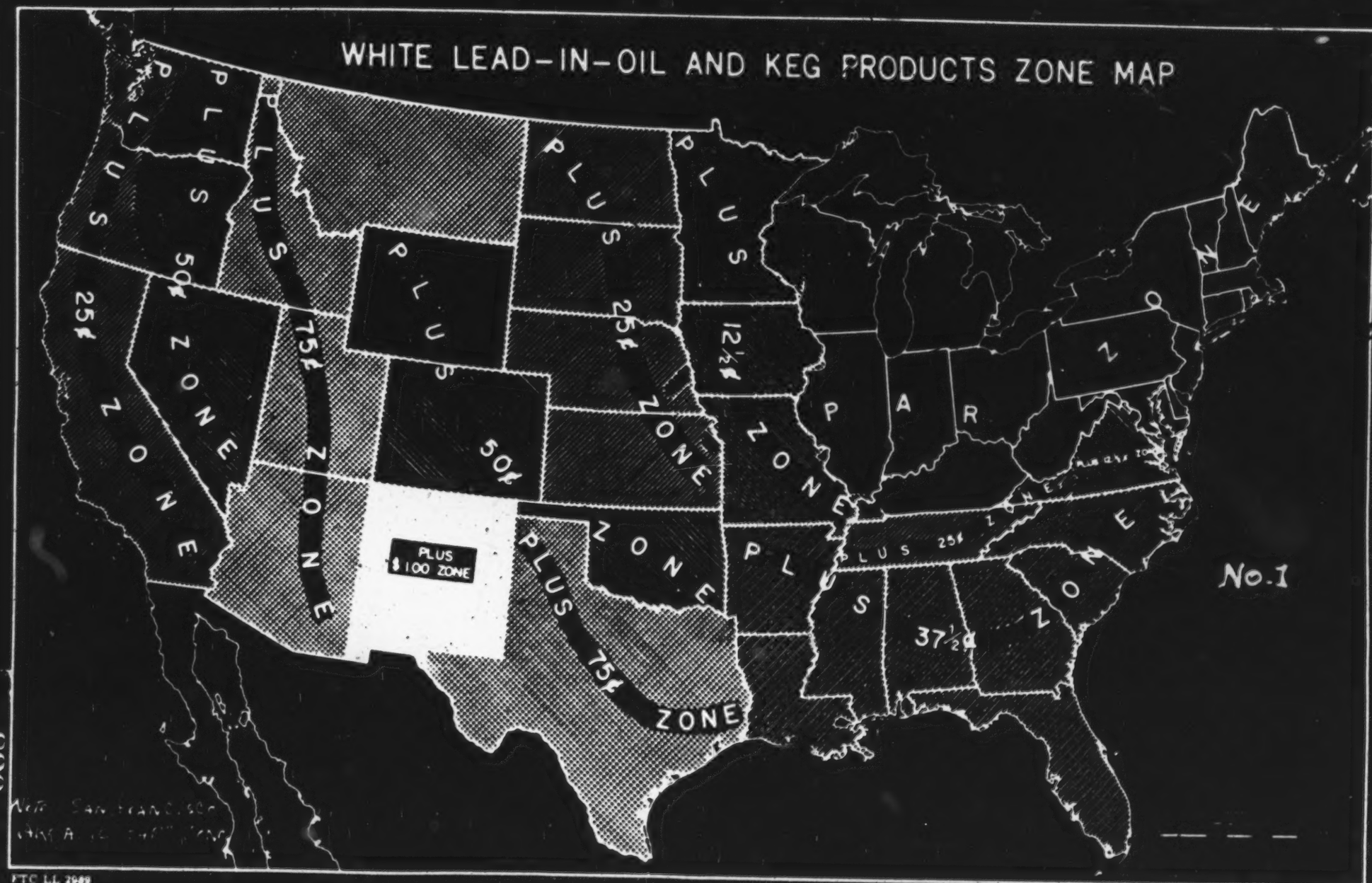
National's Relations With du Pont.

(3) Regarding the third charge involving the transactions and relations between National and du Pont, the record shows that on the 3rd day of February, 1938, du Pont renewed a contract with National which had obtained since 1924 and which was intended to deviate from the old contract by the increase of $25,000 per year of the amounts National was to receive. By the new contract (CX 797-D, -E) du Pont was to furnish National corroding pig lead, linseed oil, and turpentine, which National was to convert into white lead-in-oil to the amount of du Pont's total requirements and to package and ship the same to du Pont's order at a stated charge for processing, packaging, and shipping, with certain variations for different size packages. The raw material was furnished by du Pont and
819. the lead-in-oil belonged to it for sale or use subject to payment of the aforesaid processing and shipping charges (CX 797-D, -E). The contract contains no provision for the observance by du Pont of prices charged by National or others for lead-in-oil, nor is there direct evidence of any express agreement to that effect. However, du Pont based its calculations to determine the changes in the new contract on the card prices (CX 797-K through Z6) and subsequently requested National to furnish its card prices and changes to its branches in Boston, Flint,

Michigan, Chicago, Philadelphia, Toledo, San Francisco, and Wilmington, Delaware (CX 533). Thereafter du Pont requested a periodical letter from National "covering the price to be in effect for the quarter" (CX 534). Such a letter from National to du Pont, dated September 13, 1940, is shown by CX 535. A change in discount terms announced by du Pont met the approval of Mr. Rowe of National, who wrote his Chicago branch about it and suggested that "perhaps others in the industry will follow this good example" (CX 538). National represented du Pont in code discussions, and the latter was "willing to go along with anything which was agreeable to the others" of the Lead Industries Association, to which du Pont did not belong (CXs 506-A through -F).

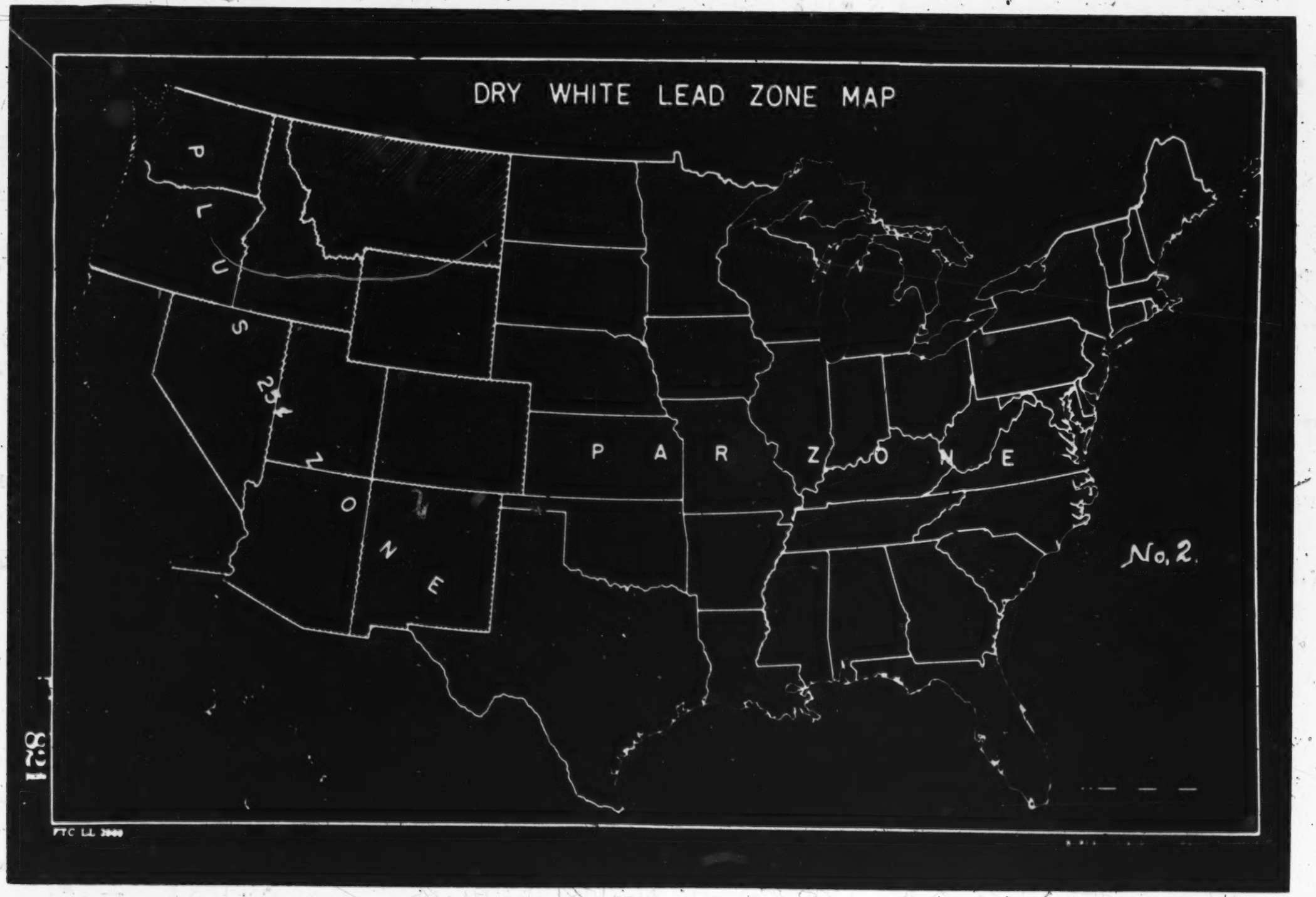
The Zone Pricing System.

(4) The fourth charge involves conspiracy between all respondents to maintain identical or matched delivered prices through the co-operative employment of a zone pricing system. The evidence is not conflicting as to the method, and there is little difference as to its use by all except Sherwin, which enters complete denial of its use, and Glidden, which sold f.o.b. various shipping points in the par zone as explained below. It is contended by respondents who did use it that the identity of method and price was not the result of agreement but followed naturally by the individual choice of each producer as the result of National's price leadership and the economic necessity of following market prices determined by the leader, which leader was largely influenced by the price of pig lead. It is necessary, therefore, to set out the details of the system and its use for consideration with other evidence on the issue of conspiracy.


WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP
PLUS 25¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢
PLUS 25¢ ZONE
PLUS 12½¢ ZONE
PLUS 75¢ ZONE
PLUS 25¢ ZONE
PLUS 37½¢ ZONE
PLUS 12½¢ ZONE
PLUS $100 ZONE
PAR ZONE
No. 1
FTC LL 2989
BUREAU OF AGRICULTURAL ECONOMICS

820

3465



3466

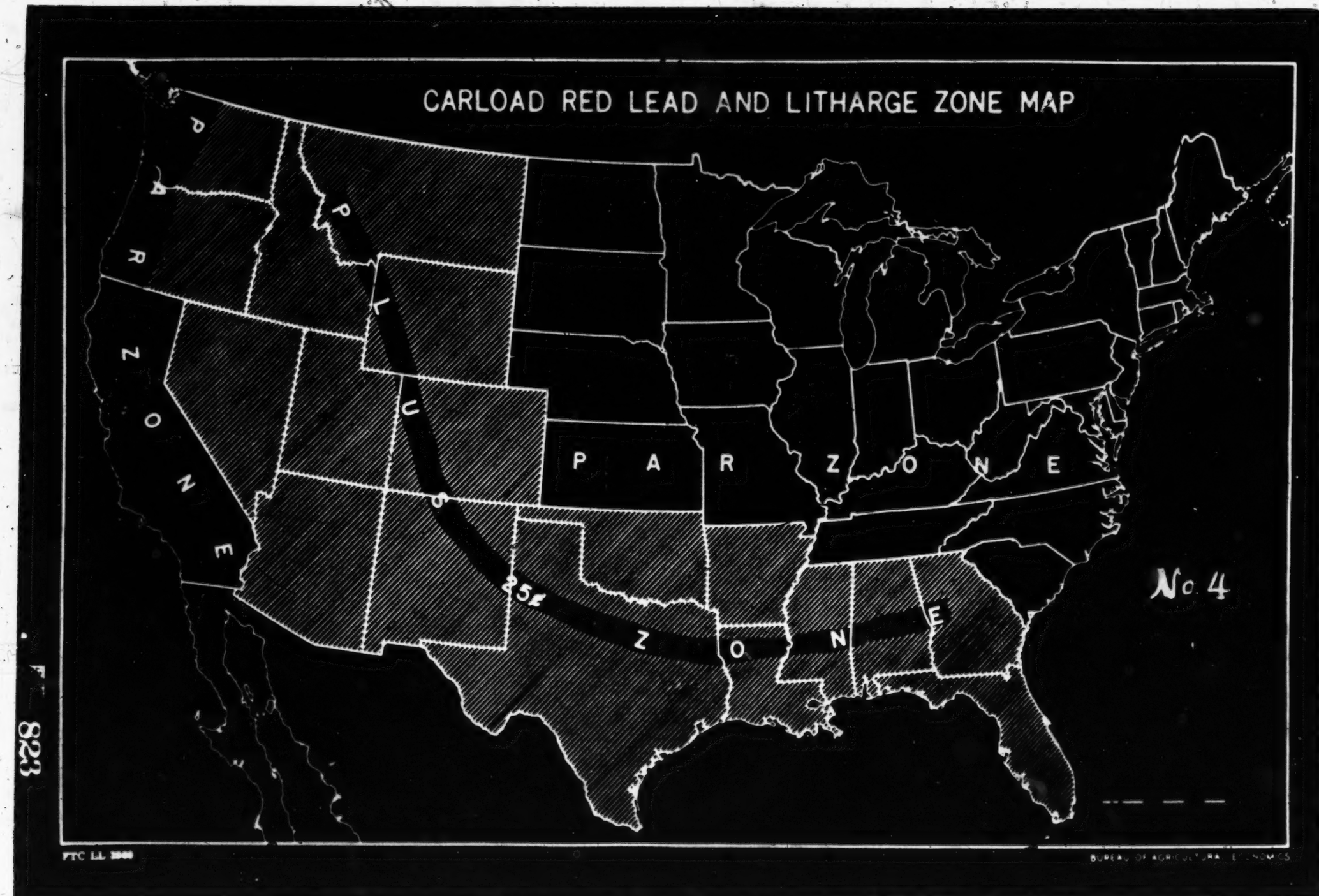
LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP

228

FTC LL 2900

BUREAU OF AGRICULTURAL ECONOMICS

2962


CARLOAD RED LEAD AND LITHARGE ZONE MAP
PARZONE
PLUS 25¢
PARZONE
PARZONE
No. 4
FTC LL 2060
BUREAU OF AGRICULTURAL ECONOMICS

823

3468

(4-a) The uniform zone pricing system substantially as employed by National and Eagle-Picher and followed in salient features by the other respondents (Tr. 1254, 1549, 2590, 2591, 2639, 3515-18; CX 595) involved the sale of lead pigments on a zone delivered price basis with a flat par price for all deliveries in a par zone, which included several states, and increased differentials over the par price for various zones outside of the par zone. Vendors prepaid or allowed deductions for all transportation
824 charges and made no allowances or adjustments for differences in delivery costs as between various destinations. The plan was operated as follows:

White lead-in-oil and keg products in steel kegs of 100 lbs. or less were sold at the same delivered cost in the par or base zone, consisting of the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Ohio, Indiana, Michigan, and all of the states of Wisconsin, Illinois and Kentucky except the towns of Paducah, Cairo, Rock Island, Moline, La-Crosse, Eau Claire, Chippewa Falls, Rice Lake, Ashland and other towns east of the Mississippi River. St. Louis and vicinity was also in the par zone.

The same commodities and packages were sold at the par zone delivered price plus 12½¢ per cwt. in middle and eastern Virginia, Minnesota, Iowa, and Missouri except for St. Louis.

A differential over par of 25¢ per cwt. was charged in Virginia west of Pulaski, and in Tennessee, North Dakota, South Dakota, Nebraska, Kansas, that portion of Washington and Oregon west of the Cascade Mountains, and California.

A differential of 37½¢ over par was charged for deliveries in North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas and Louisiana.

A differential of 50¢ per cwt. over par was charged for deliveries in Colorado, that portion of Washington and Oregon east of the Cascade Mountains, Nevada, Wyoming and Oklahoma.

A differential of 75¢ per cwt. over par was charged in the states of Montana, Idaho, Utah, Arizona and Texas.

A differential of $1.00 per cwt. over par was charged for deliveries in New Mexico (RXs 147 [Map], 148-A through 149-B, 152 [Map]; Tr. 2893, 2916; CXs 580-8, 589, 593-4; See attached Map No. 1).

Dry white lead and lead sulphate in barrels or in bags was sold at the same par delivered cost to all customers in all states except Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. In the excepted states a differential of 25¢ per cwt. was added (Map No. 2; See also RX 159-A, Tr. 1576, 2624, 3497).

Dry red lead, litharge and other pigments in barrels or bags in less than carload lots were sold at the same delivered cost to all customers in a par zone consisting
825 of all other states other than those named below. A differential of 25¢ per cwt. was added for deliveries to all points and customers in Alabama, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and west of the Cascade Mountains in Oregon and Washington.

A 50¢ per cwt. differential was added for deliveries in Colorado, Montana, New Mexico, and Wyoming.

A 75¢ per cwt. over par differential was added for deliveries in Arizona, Idaho, Nevada, Utah and east of the Cascade Mountains in Oregon and Washington (See Map No. 3; also RX 159-A, Tr. 1580, 2552, 2686).

Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 per cwt. for litharge over Smelting's closing price for common pig lead at New York on the date the order is received, and were delivered to customers in the par or base zone at the aforesaid delivered price and at 25¢ per cwt. additional for delivery to customers located in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington (See Map No. 4, also RX 159-A; Tr. 1577, 2552, 2682).

It was shown that shipments of these products were made at the aforesaid prices, terms, and differentials from the following, among other points:

Chicago, Illinois; St. Louis, Missouri; Perth Amboy, N. J.; Philadelphia, Pa.; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; Galena, Kansas (Tr. 13, 14, 1564; CX 756-A).

(4-b) The complainant contends that the zone pricing method was discussed on several occasions by representatives of all respondents in the meetings of the Lead Pig-

ments Committees of the Lead Industries Association, convened for the purpose of agreeing on and proposing an N. R. A. Code for the industry; that no proposal for such method was adopted and included in the Code, but that the respondents' minds met on those occasions and that they did agree to and thereafter employ the method outside of and beyond the sanctions of the Code.

The evidence is that on August 8, 1933, the Dry Products Committee discussed and adopted various rules for the equalization of freight (CX 800-A, -C, Pars. 9, 10, 14) which were based on the practice of adjusting freight
826 charges from various shipping or equalization points established throughout the country, the customer paying freight from these points to his destination (CXs 580, 659-C to -P; Tr. 2893-4, 2948). This had been used by National and others for some time, but in the matter of meeting prices the old method rendered it difficult to locate the various equalization points used by competitors (Tr. 2600-1; CX 501-C). On August 9, 1933, the White Lead in Oil Committee met and considered this problem. The following appears in the minutes:

"Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting." (CX 501-B, -C.)

On September 14, 1933, Mr. Maston, of Eagle-Picher, as Chairman of the Lead-in-Oil Committee, wrote the Association Secretary as follows concerning the zoning proposals:

"The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

"For your information file I am sending you a map and list of freight differential points." (CX 513-B.)

The minutes of October 28, 1933, of the Lead-in-Oil group state that "Freight and zoning problems were discussed without any understanding or agreement being made" (CX 505-A).

Following the last recorded meeting of the White Lead-in-Oil Committee during the Code period, on January 31,

1934, Maston wrote the Secretary of the Association as follows:

"I am enclosing Zone Map for the White Lead-in-Oil Industry. I believe you will find it self-explanatory.

"When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

827 "From this map we will eventually build up an official freight arrangement for this division of the lead industry" (CX 519-B).

The Secretary of the Association replied to this letter on January 2, 1934, as follows:

"Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry" (CX 510-A).

(4-c) During the course of committee deliberations as to Code provision, a method was suggested on the advice of legal counsel for employing certain recommended provisions for the supplementary code prior to their approval by the President, and respondents were advised by the Association Secretary as follows:

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

"I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago" (CX 522-B. See also CXs 517, 523).

This suggestion was passed around in October, 1933, and is apparently reflected in the minute entry of October 28, 1933, which emphasizes the absence of "any understanding or agreement" in connection with the discussion of freight and zoning problems" (CX 505-A). Very soon thereafter National announced the zone pricing plan.

(4-d) On June 9, 1934, National instructed its branches as follows:

"Please refer to our general letter of May 11th to which was attached Conditions for Sale, etc., of Oxides and Dry White Lead. Since that date the zone differentials for oxides in the territory served by the Pacific Coast have been determined, and a change has been made in New Mexico, Colorado, Wyoming and Montana applying to less carload lots.

"On dry white lead there has also been a change from our original instructions, in that a differential of ¼¢ a pound has been added to the par price in those four states" (RX 159-A).

828 It appears elsewhere that National set up the zone system on a nation-wide basis shortly after it adopted the agency plan (infra) in November, 1933, and continued to use it thereafter (CX 580, RX 147; Tr. 2893, 2916). Anaconda, through its subsidiary, Anaconda Lead Products Company, was involved in discussions of the plan and employed certain features of it until 1936, when the same methods were employed by it through its subsidiary, International (CX. 593; Tr. 1254, 3506-13). While respondents Glidden and Sherwin quoted and sold in the different zones on the differentials used by National, they did not conform in all respects to the announced plan. Glidden did not use a map, and it quoted in the par zone f.o.b. various shipping points, although it appears to have used the differentials in quoting and selling outside of the par zone (Par. 5-c5, infra; Tr. 1254, 1289-90, 2508-9). Sherwin sold f.o.b. various shipping points in the par zone and elsewhere, but applied the announced differentials to carload prices and to delivered prices at specified shipping points in the various zones, and it met zone prices of other respondents at various points in different zones (CXs 662-C to -Y, -Z1, 726; RXs 198, 205; Tr. 3759 to 3812, 4105-8, 4117-19).

Agreement and Price Uniformity Through Particular Practices.

(5) The fifth charge goes to the employment by respondents, through conspiracy and co-operation in the common purpose of maintaining uniform prices, of the particular practices set out in sub-paragraphs (a) through (e) of this charge as outlined. Since the particular practices as individually employed are not controverted in essential respects, the substance of the issue is agreement and co-operation. The decision on this controverted point must rest on (1) direct evidence of agreement and co-operation other than that authorized by the N. I. R. A., and (2) inferences based on features of the practices resorted to and on the manner of their employment. Evidence and conclusions on these points and methods are set out below.

(5-a1) The Lead Industries Association, to which all of the respondents belonged (Tr. 2134; CX 498) was employed by them as heretofore set out in part, in connection with the formulation of a code for the industry as provided by the N. I. R. A. This Association is engaged in a wide range of activities in connection with the entire lead industry. It has a Mining Division, a Smelting and Refining Division, a Metallic Lead Products Division, as well as the Lead Pigments Division, which is involved in this case, and it endeavors to promote improvements in and a wider use of lead in all forms (Tr. 2366, 2368, 2537, 829 2296-72; RXs 31-C, 50-B to -D, 52-G, 59-C). In connection with the lead pigments code, the Association maintained and operated through three Committees: the White Lead-in-Oil Committee, the Dry Products Committee, and the Lead Oxide Committee (Tr. 2160). All respondents were represented on these committees as follows: National by F. M. Carter, president, and Harold Rowe, vice president; Eagle-Picher by Mr. Bendelari, president, and its vice presidents, Messrs. Roosevelt and Maston; Glidden by Mr. Paul E. Sprague, vice president; Sherwin by Mr. S. B. Coolidge, Jr., vice president; and Anaconda (Lead Products Co.) by Mr. F. O. Case, sales manager, and Mr. Clarence Glass. Their participation in various meetings is shown by the minutes cited throughout the report. Other representatives also appeared at various meetings (Tr. 997 through 1018). The Secretary of the Association, Mr. F. E. Wormser, acted as Secretary to the Code Authority and of the Committees, received reports, and otherwise functioned as Association representative in those activities (Tr. 2159 through 2270).

(5-a2) After the adoption of a master code dealing with labor practices and other general matters of trade practice (CX 809), the Committees held meetings to discuss, adopt, and recommend provisions for a supplemental Code to regulate particular methods of packaging, selling, and delivering lead pigments. After numerous meetings and discussions, the Committees formulated and the respondent lead pigments producers agreed to a third draft which was duly recommended, approved, and incorporated in the Code on May 24, 1934 (RX 85-Z5, Z6, 82-D, E; Tr. 991-1018, 2143, 2150-9, 2314). Before the Supplemental Code was put into operation, respondents petitioned for an order of exemption from the terms of Article VII, Section 2 of the Code, a price-filing provision, and Schedule A,

rules covering conditions of sale for lead oxides and dry white lead. The exemption was granted by the N. R. A. Administrator and thereafter extended (Tr. 2218-2231; CX 507-A to M), so that these portions of the Code were never effective during the existence of the Code Authority (Tr. 2228, 2402-3; RX 9-E, F).

(5-a3) Schedule A provides for basing carload prices for lead oxides on Smelting's New York price, for differentials between 5-ton lots and less, and includes several other provisions which will be set out below in connection with the evidence bearing on the particular practices to which they relate (CX 809, pp. 378-80). The complainant contends that the recommendations by respondents amount to agreements, and that their employment by respondents was, as the result of the exemptions, never sanctioned by the Code. It is also contended that the Association was used for unhampered discussion and tacit agreement as to zone pricing and consignment arrangements which
830 were not recommended or adopted in the Code. Consequently these Schedule A provisions are relied on as some of the evidence showing agreements as to practices which were unlawfully employed, and as showing use of the Association machinery therefor.

(5-a4) Respondents contend that any agreements reached in the Committees were not agreements to employ the practices discussed, regardless of the Code, but were agreements as to what should be recommended for the Code. Evidence to this effect was received from Mr. Wormser and others (Tr. 2164, 2175, 2185, 2404). As to agreements other than those arrived at for inclusion in the Code, witnesses for all respondents, and for the Association, who had knowledge of the affairs of these concerns, testified that no such agreements as to prices, terms, conditions of sale, or selling methods had, to their knowledge, been made by their companies with other respondents or with any competitors, and that their quoted prices were based independently on market and competitive conditions (See as to National Tr. 2996; Glidden Tr. 2510-13, 2542, 2758, 2760; Eagle-Picher, Tr. 2203, 2353-5, 2406-28, 3632, 3637; Sherwin, Tr. 3701, 2661; Anaconda, Tr. 3508-33, 3537-9; Association, Tr. 2354).

(5-a5) Concerning agreements on matters not included in recommendations for the Code, such as zone pricing and consignment arrangements, it appears as heretofore shown that respondents did not agree to putting a zone provision

in the Code (Tr. 2522-4; CX 506-E), and the same appears respecting consignment (Tr. 2180). But these subjects were repeatedly discussed in Committee meetings as shown in the testimony of Mr. Paul Sprague, vice president of Glidden, and elsewhere (Tr. 2633-4). The evidence also indicates that respondents were averse to price-filing provisions, that Article VII, Section 2 was reluctantly adopted as a compromise which eliminated the rigid adherence to announced prices and terms which had been proposed, and that the exemptions heretofore mentioned were largely on account of this price-filing provision (RXs 159-D, 50-O; CXs 518-A, B, 803, 809, 504-B). The last citation relates to the omission from Code provisions of references to prices in deference to the antitrust statutes, and was made the basis of argument pro and con agreement.

(5-a6) It was shown that prices and terms for the sale of lead pigments were never filed with the Association by the members at any time. Production figures were reported by the members, but the information showing the production of individual members was not disseminated (Tr. 2162, 2187-90). It was stated by witness Wormser, Secretary of the Association, that it had never collected or furnished to members any price information, historical or otherwise, and that such statistical information as 831 it did collect and disseminate was furnished others outside of the Association, including interested Government agencies and those engaged in foreign and domestic commerce (Tr. 2188). These statistics related to the production, distribution, marketing, consumption and uses of lead and lead products (Tr. 2352). This witness stated further that the Association has not, except during the period covered by the Code, permitted in the industry any agreements to fix prices and terms, restrain trade, monopolize or curtail production (Tr. 2353-2355).

Further evidence bearing on agreement and co-operation is set out below in connection with the particular practices there considered.

Consignment or "Agency" Agreements.

(5-b1) The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories (CX 712-A). Eagle-Picher also started the plan about this time (Id.). These two respond-

ents informed each other of their practices and results in connection with this method, and National informed Eagle-Picher that its agents for the most part were in favor of the continuation of the plan (CXs 684, 685, 686). In November, 1933, National decided to extend the plan on a nation-wide basis and informed Eagle-Picher of that intention (CX 599). Eagle-Picher extended its operations under the plan at about the same time (CX 629-A, C).

(5-b2) This agency or consignment method was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933. The minutes on this subject read as follows:

"The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is 832 evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan'." (CX 501-B, C.)

The plan was discussed at length by Mr. Carter, president of National, in his letter of September 8, 1933, to Mr. Richter, General Manager of du Pont's Fabrics and Finishes Department, in which he says in part:

"Now, then, we discussed the plan at the meeting of the Pigments Section the other day and found both Sherwin-Williams Co. and Glidden Co. radically opposed because of its consignment features" (CX 506-E).

In another letter Mr. Carter says of Mr. Richter,

"He has assured me that they would go along and cooperate" (CX 506-C).

This reference is to Code matters of which Mr. Carter and Mr. Wormser were keeping du Pont informed, and

National was representing du Pont in code discussions, although the latter was not a member of the Association (CX 506-D). Agreements to employ a uniform consignment plan were never authorized by the N. R. A. Code.

(5-b3) The consignment contracts, as employed by National and Eagle-Picher, appointed distributors as "agents", in National's contracts (CX 613-A, B, C), and as "consignees" in Eagle-Picher's contracts, which also refer to the relation as an "agency" (CXs 629, 631-F, 635). The provisions of these contracts were the same in all essential particulars. Under their term stocks were consigned to a dealer for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks, and monthly settlement for the goods sold during the month was made with the consignor for the total amount so sold less the difference between the prices set for the consignee and the resale prices charged dealers and consumers. This difference (between consignee's cost and his resale price) is termed his compensation. Expenses of storing, shipping, selling, and handling the goods must be met by the consignee who must also pay all taxes. The contracts strictly limit the consignees' authority to the custody and sale of such goods as may be consigned to them. Consignees may not bind consignors respecting any other than consigned goods, or in any other particulars (Id.). National's contracts run between "manufacturer" and "agent". Some of Eagle-Picher's forms refer to
833 "seller" and "distributor" (CXs 629). Consignments were subject to withdrawal at any time, and consignees were required to report stocks on hand (Id.). Mr. Carter spoke of "selling" those who could qualify and subscribe to the requirements of the contract (CX 506-E).

(5-b4) The stated purpose of the consignment plan was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stored in distributors' warehouses and was otherwise objectionable (Tr. 2522-24). But in writing to du Pont about the plan, Mr. Carter, president of National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district . . . While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system" (CX 506-D, E).

Mr. Rowe of National, in a circular to branch managers, November 9, 1933, said in part:

"It should be kept in mind that the purpose of the whole agency plan is to control the dealer's selling price of white lead, so that he may be assured of a reasonable profit" (CX 601-B).

The agency plan was effective in preventing sales below costs and other price-cutting (Tr. 2955-6).

(5-b5) National employed the consignment plan from early in 1933 to January, 1944, when government restrictions caused it to terminate the agreements (CX 624-A, B). Thereafter National made "fair trade agreements" under the Tydings Amendment with respect to its "Dutch Boy" brand of white lead-in-oil (CXs 576, 617, 619). Eagle-Picher began consignments when National did and conformed to National's methods in every essential particular until about March 9, 1942, when it modified the contracts to meet war conditions and reduce stocks. It required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force (CX 647).

Anaconda, through its subsidiary Anaconda Lead Products Company, and later through its subsidiary International Smelting & Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigment business (Tr. 3535, 3542-3). During this time it sold some lead-in-oil on a modified consignment plan. No particular contract form ap-
834 pears to have been used by Anaconda except for dry white lead consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee. This was not shown to be similar to National and Eagle-Picher contracts. Anaconda consigned lead-in-oil in other territory on a plan of its own without written contracts, and without agreement that the consignee sell only at the resale prices suggested by the consignor (Tr. 3508, 3533-6).

Glidden, which had opposed the consignment plan, did not consign stocks until six years after the plan was inaugurated. On the urgence of its salesmen and managers that a consignment arrangement such as that of other lead corroders would double its business, it furnished forms and

instructions for consignment selling on July 17, 1939. Glidden's contract and its instructions to salesmen indicate a departure from that of National and Eagle-Picher, in that it offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry consigned stocks of competitors, and they often consigned stocks to more than one dealer in the same territory (CXs 649-A, B, 706, 626, 643, 770-A, B). Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Mr. Sprague, Glidden's vice president, testified that they had "bucked this plan for four or five years" (Tr. 2518-2523; CXs 650-A, 651). Glidden's price under this plan was "the same as that of other corroders" (CX 649-A).

Sherwin-Williams never sold on the consignment plan at any time (Tr. 3701).

Recommended Resale Prices.

(5-b6) Respondents' price cards issued periodically to dealers carried complete lists of prices at which it was suggested that they should sell white lead-in-oil or other keg products to consumers and painters. The title terms "dealers' schedule", "resale prices", "painters' price list", and "dealers' recommended selling schedule" are used on these cards, and the prices so set out by all respondents at comparable times were identical except for occasional slight variations by Glidden or Anaconda. The following table contains the card resale prices of all respondents on 100 lbs. as of the dates shown, which are the effective dates on each card:

835

Resp.	In 100 lb. kegs	In 50 lb. kegs	In 25 lb. kegs	In 12½ lb. kegs	Date	Com. Exhibit
National	13.00	13.25	13.50	13.75	9/13/37	659-Z1
Eagle-Picher	13.00	13.25	13.50	13.75	9/14/37	660-A
Anaconda	13.00	13.25	13.50	13.75	9/15/37	661-Z3
Glidden	12.50	12.75	13.00	13.25	10/20/37	663-E
Sherwin	13.00	13.25	13.50	13.75	9/15/37	662-Z9
National	11.75	12.00	12.25	12.50	1/10/38	659-Z15
Eagle-Picher	11.75	12.00	12.28	12.56	1/11/38	660-C
Anaconda	11.75	12.00	12.28	12.56	1/10/38	661-Z1
Glidden	11.75	12.00	12.25	12.50	1/11/38	663-F
Sherwin	11.75	12.00	12.25	12.50	1/11/38	662-Z13

National	12.25	12.50	12.75	13.00	2/27/39	659-Z31
Eagle-Picher	12.25	12.50	12.76	13.04	3/ 1/39	660-F
Anaconda	12.25	12.50	12.75	13.00	3/ 3/39	661-X
Glidden	12.25	12.50	12.75	13.00	2/27/39	663-I
Sherwin	12.25	12.50	12.75	13.00	2/23/39	662-Z19
National	13.25	13.50	13.75	14.00	4/26/41	659-Z41
Eagle-Picher	13.25	13.50	13.75	14.00	5/ 1/41	660-H
Anaconda	13.38	13.63	13.88	14.13	5/ 3/41	661-Z27
Glidden	13.25	13.50	13.75	14.00	4/26/41	663-K
Sherwin	13.25	13.50	13.75	14.00	4/25/41	662-Z23

On all cards the suggested prices to painters were $1.00 less than each quotation given above.

Uniform Quotations.

(5-c1) Regarding the collective fixing, quoting, and employing uniform prices, terms, and conditions of sale, it was shown that respondents, through the Association and Code Committee meetings, discussed, agreed on, and recommended provisions for the collective employment of the following methods:

Pricing lead oxides, or mixtures, in 20-ton lots or more on Smelting's price, or published price, for common pig lead, and selling smaller quantities on "seller's card or quoted price in effect on date order is received", with the reduction of ½¢ per lb. under the card price for 5-ton lots to one delivery;

836 Selling red lead (lead oxide) containing 97% Pb_3O_4 at ½¢ lb. and that containing 98% at ½¢ lb. over seller's price for lower grades;

Selling basic lead carbonate (dry white lead) at seller's card price or quoted price in effect on date of order, with a reduction of ½¢ per lb. on 20-ton lots to one buyer and one destination;

Delivering carlots of oxide or basic lead carbonate f. o. b. car, seller's shipping point, or by truck on 3-day deliveries f. o. b. buyer's premises;

Selling on terms of net 30 days on car shipments of oxide and 1% 10 days, 30 days net, on L. C. L. shipments of oxides and on all shipments of basic lead carbonate (CX 809, Schedule A);

Discontinuing guarantees against price declines except for undelivered portions of contract purchases (CXs 505, 506; Tr. 2633-4; Par. 5-a).

(5-c2) References to particular prices as distinguished from price differentials do not appear in Schedule A. and such was purposely avoided (CX 504-B). Many of the terms and conditions included had been employed previously by various respondents (RX 181-A, B; CX 659-A, B, O, Z51), and National put Article II of the supplementary code into operation some months prior to its formal adoption (Tr. 4076-7). The differentials over Smelting's price on pig lead of $1.50 per cwt. for litharge and $2.50 for red lead had been employed for some time prior to 1933, and respondents used them uniformly thereafter (Tr. 1292, 1326-8, 1618-20, 2666, 2692-7; CXs 137-A, 762-B). Prices of oxides in smaller quantities were based on the aforesaid carload prices as determined by these differentials (Tr. 1618-21, 2390-7). The stated differentials between 20 tons and less on lead carbonates and between 5 tons and less on lead oxides appear on the price cards of all respondents quoting on these products after 1933 (CX 659 through 663, 615-B, and citations below).

The lead price basis and the fixed differentials eliminated variable factors in the price structure (Tr. 1618, 2674, 2679; CX 801-I, and supra; RX 141-3). All of the Schedule A methods were consistently observed and practiced by all respondents during and after the Code period with the exception of the stated terms and f. o. b. car deliveries at seller's plant. The dealers' price cards considered below indicate that the terms used varied from 1% ten days, net 30 days to 2% ten days, net 60 days, but at any period the terms of all respondents on similar products and quantities were uniform (CXs 659 837 through 663), and the deliveries were for the most part to buyer's location, to seller's plant with freight allowed, or f. o. b. stated shipping or equalization points (Id. See also RX 159-A to J, Tr. 1617).

(5-c3) As to the contention by respondents that the similarity between their prices, terms, and differentials was the natural result of National's leadership and not indicative of agreement, Glidden's vice president, Mr. Sprague, testified that National's price made a ceiling for them and that they had to operate in the narrow range between this ceiling and the price of lead (Tr. 2509, 2532, 2546). Mr. McCarthy, General Sales Manager of National, testified that National made prices for basic white

lead without regard to competition, but is competitive with other pigments (Tr. 1661); that such prices were made by the general office after the consideration of such factors as the cost of pig lead, containers, labor, freight, research, and advertising as well as current prices of competing pigments such as leaded zinc, zinc oxide, titanium, and others. In prices for lead-in-oil, the cost of linseed oil and the price structure for prepared paints would also be considered (Tr. 2998-9). Other respondents adduced testimony that they obtained National's and Eagle-Picher's prices, terms, and quotations from customers and from trade publications, and that they thereafter met this competition because failure to meet lower prices and terms resulted in loss of orders, while meeting National's price raises, so far as they could, broadened their restricted profit margins and was necessary to their business (Glidden, Tr. 2510-13, 2674, 2457; Sherwin, Tr. 3809-11, 3829, 3833-38; Anaconda, Tr. 3499, 3504-5, 3580).

(5-c4) Some deviations from National's prices were shown and explained. Eagle-Picher sold its Hammer brand at ¼¢ per lb. less than National's white lead-in-oil (Tr. 1554). Glidden sold lead-in-oil to dealers at ¼¢ per lb. under National's card price for "Dutch Boy" because of the wide demand National had created through its prestige, advertising, and greater ability to supply the trade (Tr. 2457, 2491, 2499-2502, 2509, 1255). Glidden sometimes made concessions to encourage greater sales effort on the part of dealers, and sometimes it charged dealers 5¢ more per 100 lbs. than National and others charged (CXs 662-Z17, 663-H, 659-Z28; Tr. 2507). In all cases the dealer's resale or "list" prices announced by Glidden were the same as the others (Id.). Anaconda sold lead-in-oil at ¼¢ per lb. below National's "Dutch Boy" brand because its management believed the latter's prestige in the trade was such that Anaconda's brand could not compete at the same price (Tr. 3512-13). This concession was made to the dealer to encourage extra
838 sales effort, but the suggested resale price was not reduced (Id.). Glidden also sold basic lead carbonate to paint manufacturers at ¼¢ per lb. under National's competitive levels (Tr. 2535). Both Anaconda and Glidden continually endeavored to produce and did produce improved products in order to build them up to National's price on "Dutch Boy" (Tr. 2542-3, 3581-3). In sales of

lead oxides to large battery manufacturers National and Eagle-Picher made substantial price variations from each other which involved reductions from prevailing price cards and from prices charged other customers during the same months. These sales were in line with the policy discussed in the committee meetings (CX 800-C), of preventing large battery manufacturers from making their own oxides (CXs 840-Z255 over Z253, Z259; 845-P, W, over 845-E et seq.; 659-Z43; Tr. 1576-82, 1596; CXs 853-4). Price variations in bids to governmental agencies are shown hereafter (See also Tr. 2551, RXs 306-8).

(5-c5) Subsequent to those agreements as to what should be recommended for the Code, respondents issued periodical cards containing quotations of prices and terms for sales to dealers and others. Following is a table showing parallel quotations on white lead-in-oil and other keg products per 100 lbs. in 100-lb. or larger containers for the dates shown, which dates correspond to those of the recommended resale price cards set out above in subparagraph 5-b6, to wit:

Resp.	100 lb. keg	Date	Com. Exhibit	100 lb. keg	Date	Com. Exhibit
National	11.00	9/13/37	659-Z-1	10.00*	1/10/38	659-Z-14
Eagle-Picher ...	11.00	9/14/37	660-A	10.00*	1/11/38	660-C
Anaconda	9.88	9/15/37	661-Z-14	8.63	1/10/38	661-Z-12
Glidden	9.50	10/20/37	663-E	8.55	1/11/38	663-F
Sherwin	9.75	9/15/37	662-Z-9	8.50	1/11/38	662-Z-13
National	10.25	2/27/39	659-Z-29	11.25	4/26/41	659-Z-39
Eagle-Picher ...	10.50*	3/ 1/39	660-F	11.50*	5/ 1/41	660-H
Anaconda	9.25	3/ 3/39	661-Z-40	10.38	5/ 3/41	661-Z-69
Glidden	9.00	2/27/39	663-I	11.50	4/26/41	663-K
Sherwin	9.00	2/27/39	662-Z-19	10.00	4/25/41	662-Z-23

* ¼¢ per lb. deducted on orders of 500 lbs. or more.

839 National's and Eagle-Picher's quotations include cost of delivery. Anaconda quotes f. o. b. East Chicago, freight allowed. Glidden quotes f. o. b. the following shipping points:

Baltimore, Md.; Boston, Mass.; Buffalo, N. Y.; Chicago, Ill.; Cleveland, Ohio; Scranton, Pa.; Evansville, Ind.; Long Island City, N. Y.; Reading, Pa.; St. Louis, Mo.; Toledo, Ohio; and Detroit, Mich.

Sherwin quotes f. o. b. the following shipping points:

Altoona, Asutabula, Birmingham, Buffalo, Canton, Charleston, Cleveland, Columbus, Detroit, Huntington,

Johnson City, Mansfield, Pittsburgh, Rochester, Uniontown, Warren, Wheeling, and Youngstown.

The foregoing are eastern or par zone prices. To make accurate comparisons as to purchasers' costs, small freight costs from Glidden's and Sherwin's shipping points to each destination would have to be ascertained and added to their lower quotations—and these would be different for each location. However, Anaconda's quotations on a freight-allowed basis were substantially lower than National's and Eagle-Picher's quotations, which are identical with each other in all the periods shown except for the quantity requirement of Eagle-Picher in 1939 and 1941. Prices to consignment accounts were $1.00 to $1.25 lower than the dealer prices set out above (Id.).

Uniform Sales Prices.

(5-c6) Regarding uniformity of prices in actual sales, the tabulations set out below show comparative prices charged on invoices covering sales during quarterly periods selected as representative of general practices as revealed by examinations of a great many retained copies of invoices produced from respondent's files. The invoices tabulated cover less-than-carload shipments from respondents' various production and shipping points to 16 cities in the par zone, including Boston, Milwaukee, St. Louis, and Wheeling, West Virginia.

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SALES OF WHITE LEAD-IN-OIL—PAR ZONE—PRICE PER CWT.—JANUARY THROUGH MARCH, 1941.

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
National	96	Agents	$ 9.75		CX, 752-B, H, M, N, O,
	269	"		$ 9.75	Z8-9, Z10, Z18, Z32, Z33-34, Z67-68, Z91, Z98, Z111
Eagle-Picher	13	Distributors	9.75		754-F, L, M, O, Q, T, U, Z6
	49	"		9.75	754-B, C, D, F, G, H, I, L, M, O, Q, S, T, U
Anaconda	3	Agents		8.37	795-M, P
Glidden	4	Agents	9.75		772-F, D
	1	"	9.55		772-Z-15
	1	"		8.25	772-Z-15

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
National	6	Dealers	10.75		752-Z-18, Z43, Z69
	11	"		10.75	752-D, P, Z18, Z43, Z94
	1	"	11.00		752-Z-94
Eagle-Picher..	3	Dealers		10.75	754-Z-31, Z-32
Anaconda	53	Dealers	9.50		795-M, O, P, Q, Z6, Z7
	24	"		9.50	795-M, O, Q, Z6, Z7
	1	"	10.50		795-Q
	1	"		10.25	795-P
Sherwin-Williams....	8	Dealers	9.50		794-D, Z, Z-4
	4	"		9.50	794-D, Z, Z-4
Glidden	6	Dealers	9.55		772-Z15, Z16, E
	1	"	10.75		772-F
	1	"		8.50	772-Z-15
	1	"		8.65	772-Z-15
	1	"		8.78	772-Z-15
	1	"		9.07	772-Z
	32	"		9.55	772-Z-16, Z-17, E, F
	1	"		9.75	772-Z-17

National's card prices for this period were $9.75 to agents and $10.75 to dealers. Eagle-Picher's and Glidden's were the same except for an additional 25¢ on less than 500 lb. quantities (CXs 659-Z-35 to 38, 660-G, 638, 663-J, 649-A. See Tr. 705, 612-48 as to selection of invoices).

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SALES OF WHITE LEAD-IN-OIL—PAR ZONE—PRICE PER CWT.—OCTOBER THROUGH DECEMBER, 1941.

National.....	69	Agents	$10.25		752-B, I, T, U, V, Z12, Z13, Z35, Z39, Z61, Z74-76, Z92, Z98, Z121
	244	" "		$10.25	Ditto
Eagle-Picher..	9	Distributors	10.25		754-E, H, L, M, Q, T
	50	"		10.25	754-B, C, D, E, F, G, H, I, L, M, O, Q, S, T, U
	1	"		10.00	754-B
	1	"	10.00		754-B
Anaconda	3	Agents		9.835	795-T, X, Z
Glidden	7	Agents	10.25		772-K, Z26, G
	2	"		10.25	772-Z24, J
	1	"	10.375		772-Z-24
	1	"	10.05		772-Z-24
National	6	Dealers	11.25		752-Z-43, Z79
	23	"		11.25	752-E, W, Z61, Z43
	3	"	11.50		752-W
Eagle-Picher..	1	Dealers	11.25		754-Z24
	1	"	11.75		754-Z25
	3	"		11.25	754-Z30, Z32

Seller	Number of Sales	Class	Under 500 Lbs.	500 Lbs. or Over	References to Exhibits
Anaconda	64	Dealers	10.00		795-Z8, Z10, S, T, U, X, Z
	79	"		10.00	795-S, T, U, X, Z, Z8, Z10, Z11
	1	"	10.50		795-Z10
	1	"	10.75		795-Z10
Sherwin-Williams....	13	Dealers	10.00		794-Z4, Z1, I, Z
	9	"		10.00	794-Z1, Z4, I, Z
	5	"		9.50	794-I
	2	"	10.50		794-Z1
	2	"	10.75		794-Z
Glidden	10	Dealers	10.05		772-Z25, Z24, K, G,
	22	"		10.05	772-Z25, Z24, I, J, K
	1	"	10.75		772-Z24
	1	"	11.25		772-G
	1	"		9.33	772-Z24
	2	"		9.448	772-Z3, G

National's card prices for this period were $10.25 for agents and $11.25 for dealers. Eagle-Picher's were the same except for the addition to dealers of 25¢ per cwt. on less than 500 lbs. (CXs 659-Z39 to 42, 660-H, 688).

842 (5-c7). The foregoing record of 1,230 sales covering two quarterly periods reveals a complete uniformity in price between National and Eagle-Picher, a substantial variation between these and the substantially uniform lower prices charged by Anaconda, Glidden, and Sherwin for the same periods. Two distributor sales out of 123 by Eagle-Picher were 25¢ under National's price to agents, and those items were billed at the regular price, $10.25 "less 25¢". Anaconda conformed to National in 4 and undersold 25¢ or more in 2 sales to agents. Eagle-Picher's prices to dealers in the 8 sales shown were the same or higher than National's card and sales prices. Sales to dealers for both periods show that Anaconda made 220 sales at $1.25 less than National's lowest price, 1 sale at 75¢ lower, and 1 sale at 50¢ lower; Glidden made 70 sales at $1.20 lower than National's lowest price, 2 sales at National's price, 1 at $1.00 under, 1 at 50¢ under, and 6 at more than $1.75 under; Sherwin made 34 sales at $1.25 under, 5 sales at $1.75 under, 2 sales at 75¢ under, and 2 sales at 50¢ under National's lowest price. The deviations by Glidden and Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points (Id.).

(5-c8) Invoices covering 304 sales of white lead-in-oil for January through March, 1941, by National and Eagle-

Picher to Zones 2, 3, 4, 5, 6, and 7 to agents and distributors reveal a strict observance of all zone differentials by both and identical prices in all but three sales over card and three sales under card by National (CXs 752-A through Z116, 754-A through R). The same exhibits reveal 34 lead-in-oil sales to dealers in Zones 2 to 6 by Glidden, Anaconda, and Sherwin, which reveal their strict observance of all zone differentials, price uniformity between them in all premium zones into which two or more shipped, and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices (CXs 772-Z15, 794-D, I, Y, Z, 795-M, P, Q).

(5-c9) Sales of dry white lead in car and less than car lots to manufacturers in the par and 25¢ zones are shown by 448 invoices covering the first quarter of 1941. These conform to the zone differentials and follow, with a few exceptions, a price pattern which involves quantity differentials between car lots and less sold to manufacturer customers (CXs 752-G through Z120, 754-W through Z9, 772-Z, 794-Z, 795-M through Z7).

(5-c10) Sales of red lead and litharge (oxides) as evidenced by invoices of National, Eagle-Picher, and Glidden for the last quarter of 1941 follow the formula of $1.50 for litharge and $2.50 for red lead over Smelting's pig lead quotations and the quality differentials on red lead. With occasional exceptions covered by contract sales and 843 sales to battery manufacturers, the prices of the three were uniform. The quantity differentials which each applied were 90¢ per cwt. over car prices for less than 5 tons, and 40¢ over car for 5-ton lots (CXs 831, 840, 842, 843, 845, 846, 847. See also Tr. 1599, 1618, 1637, 2545, 2552, 2682).

Uniform Bidding.

(5-c11) Means of eliminating excessively low bids on government and state purchases were discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business was considered and the group was asked to give the matter further thought (CX 501-C). On Sherwin's trade bulletins to its managers and salesmen, instructions are given for following large dealers' prices on Government, State, and municipal bids (CX 662-B, F, J. R). Identical bids were repeatedly submitted on basic carbonate white lead from 1938

to 1941 to the City of Cincinnati by National, Eagle-Picher, and Sherwin. These bids were identical to the fourth and final decimal (CX 864; Tr. 4095). Identical bids on white lead-in-oil were submitted to the Milwaukee Board of Purchases as follows: In 1939 by National and Sherwin, both bidding $8.33 per hundred; in 1940 by Eagle-Picher, National, and Sherwin, all bidding $8.57; in 1942 by Eagle-Picher and Sherwin, both bidding $9.80 while National bid $10.05; in 1943 by Eagle-Picher, Sherwin, and National, all bidding $9.80 (CX 865-A through E; Tr. 4096). However, bids by respondents to federal agencies, involving bids to the Treasury Department, the Navy, and the Panama Canal Zone, during 1939, 1940, and 1941, contain twelve cases of unequal bids by respondent and nine cases of identical prices by two or more of them, all respondents, including Glidden, being involved (RXs 306-A, B, 307-A, B, and 308-A, B, C; Tr. 4096).

Container Differentials.

(5-d) Container price differentials were discussed in detail at the meeting of the Lead Pigments Division, Dry Products Committee, on August 8, 1933, and the following provision was tentatively adopted but was not thereafter approved for the Code, to wit:

"On government bids and on railroad (and industrial) business the following package differentials over L. C. L. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	.75
25 lb. kegs	1.00" (CX 800-C).

844 Thereafter all respondents, as shown on the numerous price cards heretofore cited, quoted and charged a differential of 25¢ as between the various container sizes used to contain 100 lbs. of pigment. That is, 100 lbs. in two 50-lb. kegs or cans was sold at 25¢ more than the price for the same quantity in one container. For four 25-lb. containers, 50¢ was added, and for eight 12½-lb. containers, 75¢ was added. All respondents admit employing this practice without deviation, and it was shown by both Sherwin and National that the differentials charged are less than the cost involved as between single containers requiring

only one process of sealing, packing, labeling, and handling, and the costs of the additional containers, each of which is similarly processed (RXs 210, 309; tr. 3882-6, 4175).

Quarterly Contracts.

(5-c) Respecting the making of quarterly contracts by respondents for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead, there was an N. R. A. Code provision for contract sales with specific provisions for the basing of prices on the seller's card price on the first day of each quarter (CX 809, Schedule A, Article III), and there was also a provision for basing carload prices on Smelting's market prices on the date orders were received (CX 809, Schedule A, Article II). The matter of uniform sales contracts and conditions therefor was discussed in committee prior to the adoption of the Code, and some of the provisions were incorporated in the second draft (CXs 799-802-A). But these were not adopted and it was not shown that a uniform contract was ever agreed on or used generally. National continued to make quarterly contracts for car lots of lead oxides until 1942, and these followed generally the Code provisions of subsections (b) and (c), Article III of Schedule A (Tr. 1658-60, 3080; CX 809, p. 380). Eagle-Picher continued after the Code to make oxide sales contracts for six months or more (Tr. 1590, 1603, 1618). Sherwin continues to make quarterly contracts for oxides, and the price is based on the New York market for pig lead as published in the Engineering Mining Journal (Tr. 1326-28; CX 823-A to G). In 1941-2 Glidden (Euston) made yearly contracts for white lead, basic carbonate, in which no mention is made of a lead price basis (CXs 811-821). The formula for differentials over pig lead prices was applied solely to carload prices on oxides (litharge and red lead). On less than carloads of oxides the card prices, based on carload prices, were used (CX 809, Id.). These provisions were observed by all except Anaconda, which sold no oxides, during and after the Code period (Id.).

845 Red Lead Differentials.

(5-f) All respondents except Anaconda, which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed on for Schedule A. For 97% Pb_3O_4 a charge of ½¢ per lb. over lower grades was added. For 98% the charge was ½¢ over the 97% grade (CXs 659 through 663, 752 through 795). The higher grades of red lead are made by extra burning and involve a difference in cost of manufacture, as shown hereafter.

Evidence of Effects.

(6-a) Regarding effects of the practices shown above, it is clear that National's acquisitions and its close co-operation with Eagle-Picher gave the two more than 68% of the white lead, dry and in oil, business and more than 50% of the oxide business in the United States (Par. 1-e). It also appears that the consumption of pig lead by these two respondents was approximately 50% of the total produced and sold for the manufacture of lead pigments in the United States (CXs 98, 851; RXs 173-4), and that the price of lead pigments announced and maintained by National and Eagle-Picher had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get (Pars. 1-f, 2-f, 5-c3). The effect of National's contracts with Smelting was to confine the price on a major part of United States consumption of pig lead to an average monthly price and thus prevent the basing of prices on daily market fluctuations, and to restrict opportunities of buying pig lead at lower prices (Tr. 4084, Par. 1-e).

(6-b) The effect of zone pricing within a zone was to equalize prices between all customers within the zone regardless of proximity to the shipping point. All deliveries were made without extra charge. No allowance was made to the near-mill customer because of the smaller delivery expense, and no extra charge was made to the distant customer because of the increased cost. These delivery costs for a single shipping point varied on white lead-in-oil in the par zone from a few cents per cwt. to 56¢ per cwt., and the average freight for the zone on the shipments from one

location was shown to be approximately 20¢ per cwt. (CX 752; RX 166). Therefore, the delivery cost component of all par prices was about 20¢ per cwt. on products which averaged about $9.00 in price per cwt., making the delivery cost involved in each customer's delivered price 2.2 per cent of that price. But an f.o.b. mill price would give the processor at the shipping point an advantage equal to the actual cost of transportation to his competitor's location (Par. 4).

846 For extra price zones, the average freight on keg products was shown to be 49½¢ per cwt. in the plus 12½¢ zone, and 80.8¢ per cwt. in the plus 37½¢ zone (RXs 166-A, 171). On dry white lead the approximate freight overages were: 35¢ in the par zone and 76¢ in the 25¢ zone (RX 214). These differences were less than the average freight differences for a particular zone, but for shipments to near points to zone borders and shipments from points within a premium zone to customers in premium territory, the price differential was more than the freight difference in a substantial number of cases (Par. 4-a to c). This feature is considered under Count Two.

(6-c) The effect of the zone price on competition between customers of respondents was to enable distant processors to compete millwise on an equal cost basis with the near-mill customer, which they could not do if the latter had an f.o.b. mill price. That is, the near-mill processor receiving mill-net prices has an exclusive competitive advantage which extends in diminishing degree all the way to the location of the distant processor who pays mill net plus freight. The near processor is on an equal cost footing at the distant competitor's location and at all points beyond. The latter would have no advantage zone except as against a more distant competitor, and this he must share with the near-mill competitor. This situation was explained by witness Vasterlinger, technical director of Davis Paint Co., Kansas City, Missouri, who said he preferred buying his pigments at a delivered price as long as his competitors buy theirs at the same price, because it prevented his being at a competitive disadvantage in shipping back towards the source of his raw material. He said he would prefer this situation to one which enabled him to make freight savings and not be on an equal basis with competitors nearer the supply (Tr. 3598, 3606-14). Mr. Sprague, vice president of Glidden, said f.o.b. prices would circumscribe and seriously injure the business of his company, and that

customer relations were much better under the present system (Tr. 2565-82).

(6-d) Zone pricing simplifies the process of quoting and selling and enables salesmen and customers to avoid complicated freight calculations in order to compare competitors' prices. In the sale of keg products it did not prevent differences between the identical prices of National and Eagle-Picher and the substantially similar prices of Anaconda, Glidden, and Sherwin (Pars. 5-c6 to c9), but the system, as indicated by the price cards and the features heretofore shown, had the effect of facilitating price matching and price uniformity. And the system did produce on the part of all respondents a complete uniformity of
847 price differentials and uniform prices on dry white lead and oxides (Pars. 5-c8, c9, c10). But it does not appear clearly that a substantial surrender of territorial advantages by any respondent was involved in the zone pricing system. National had producing and shipping points throughout the country from Boston to San Francisco (Par. 1-d). Eagle-Picher had plants in Cincinnati, Ohio; Joplin, Missouri; and Newark, New Jersey, and now has one in Chicago (Tr. 1552, 1564, 3035). Glidden had plants in Scranton, Pennsylvania and Hammond, Indiana (Tr. 2553, 2561). Anaconda and Sherwin had plants in Chicago (CX 836-A to N; Tr. 1313). It was not shown that any of these locations had substantial advantages which the zone pricing eliminated.

The combined results of the various practices heretofore shown as to tendency and effect of restraining trade and lessening competition are stated below under Conclusions.

Conclusions on Acquisitions and Methods.

(7-a1) The evidence set out in Paragraphs 1-a to e shows that National acquired a predominating position in the lead pigments industry and added to its dominant power by establishing close co-operation with Eagle-Picher (Pars. 1-f, 2-a, e and 5-a to e). National acquired by contract control of 85% of Smelting's output of pig lead and restricted its own use of pig lead produced by its subsidiary, the St. Louis Smelting & Refining Company, to 30,000 tons per year. Through another subsidiary, the Hoyt Metal Company, National acquired control over all of Smelting's output of antimonial lead. These arrangements contracted the supply of pig lead subject to bids and daily

market fluctuations by more than 32% of domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores. On the other hand, the arrangement, through a substantial contraction of supply, tended to prevent lower prices for pig lead. The effects on prices of pig lead were evidently trade-restraining and monopolistic. National's arrangements since 1921, when the 1906 contract expired, were through short-period contracts which are the same in effect as the requirements of the old contract (Par. 2-d to f). The purpose and effect of National's acquisitions, as shown by the circumstances of their execution and the conduct of the business thereafter, was to control the lead industry and to regulate prices of pig lead and lead pigments.

(7-a2) National's relations with du Pont were such as to evidence a tacit understanding that the latter would not deviate from National's prices in the sale of white lead-in oil, and the two co-operated to maintain price uni-
848 formity. Du Pont was in competition with National in the sale of this product, which the latter processed under contract (Pars. 3, 5-b2).

(7-a3) Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale. Respondent Anaconda, through its subsidaries, employed the zone pricing methods established by National and Eagle-Picher so as to produce (1) substantial price uniformity with all respondents in the sale of dry white lead, and (2) uniform variations in its prices for lead-in-oil and other keg products from prices set by National and Eagle-Picher, and substantially uniform prices with Glidden and Sherwin on these products. Respondents Glidden and Sherwin departed from the zoning method by quoting f.o.b. various shipping and equalization points to many customers, but they observed the zone prices in carload shipments, in establishing shipping point prices, and in selling at competitive points. They thus maintained (1) uniform prices with all respondents on oxides and dry white lead, and with Anaconda in the sale of lead-in-oil and other keg products, and (2) uniform variations from National's and Eagle-Picher's prices on said keg products (Pars. 4-a to e, 5-b, 5-c2, c6).

(7-a4) All respondents employed the Lead Industries

Association as a medium for conferences and agreements respecting methods of selling lead pigments, some of which were agreed on and recommended for the N. R. A. Code, and a number of which were unlawfully employed by respondents as herein appears (Par. 5-a1 to a6).

(7-a5) The "Agency Plan" was employed by National and Eagle-Picher. Some features of it were followed for a short time six years later by Glidden, which had opposed its adoption for the Code. Anaconda followed a modified plan which did not require its consignees to resell at a fixed price. Sherwin did not use the plan in any way (Par. 5-b1 to b6).

(7-a6) All respondents discussed and the Lead Pigments Committees recommended for the Code the pricing methods set out in Paragraph 5-c1, relating to (1) basing lead oxide prices on Smelting's price for common pig lead, (2) allowing ½¢ per lb. under card prices on 5-ton lots of lead oxides, (3) allowing ¼¢ per lb. on 20-ton lots of basic lead carbonate, (4) charging ¼¢ and ½¢ per lb. respectively over lower grades on 97% and 98% red lead (Par. 5-c1), and that they discussed, without recommending for the Code, differentials between containers of 100, 50, 25, and 12½ lbs. (Par. 5-d). Thereafter all respondents ap-
849 plied differentials 2, 3, and 4 as stated above in their quotations and in their sales without a substantial number of deviations (Pars. 5-c2, 5-c3, 5-c5, 5-c6). And all respondents, except Anaconda which sold no oxides, based carload prices for lead oxides on the New York price for common pig lead, which prices were Smelting's prices (Par. 5-c2).

(7-a7) Respondents National and Eagle-Picher, as shown by many price cards and many hundreds of invoices covering sales made in different quarterly periods and in different years, sold lead pigments at identical prices, terms, and differentials (Par. 5-c6), with the exception of sales of oxides to large battery manufacturers (Par. 5-c4).

(7-a8) All respondents discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies, and thereafter submitted identical bids in a substantial number of cases (Par. 5-c7); and

(7-a9) Respondents issued periodical price card quotations containing lists of identical resale prices at which dealers were expected to sell lead pigments to consumers and painters (Par. 5-b6).

Conclusions as to Agreements.

(7-b1) From evidence of the various conferences, practices, and results as heretofore set out, it appears that there was agreement between National and Eagle-Picher as to the zoning plan and the agency plan. They quoted and sold white lead-in-oil and other products at identical prices, except to a negligible degree. They employed the same quantity, quality, container, and class differentials. They used the same differentials over pig lead as a basis for prices on lead oxides. They suggested to dealers identical resale prices to consumers and painters, and sold on the same terms and conditions. These similarities of action were subsequent to discussions between themselves and others as to these methods. One of these features, the "Agency Plan", was shown by conclusive evidence to have the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits to dealers. The zone pricing feature was shown to be a method which facilitated the meeting, or matching, of competitors' prices. The quantity, quality, class, and container differentials were agreed price variations which tended to prevent differences in price as between sellers. The adopted method of basic oxide prices on Smelting's prices furnished a common denominator for maintaining uniform prices on lead oxides. And the continuous uniformity of prices, terms, and conditions of sale in white lead and other
850 keg products not only illustrates the effectiveness of the methods, but also reveals the purpose underlying their employment. These discussions, practices, and results show conclusively that respondents National and Eagle-Picher agreed, co-operated, and pursued the common purpose of fixing and maintaining uniform or identical prices, terms, and conditions of sale, and that the same eliminated price competition between themselves and directly affected more than 68% of the lead pigments trade and indirectly limited price competition in the remaining 32% by circumscribing the price range of their competitors.

Denials were made by various officials of all respondents that there were not, to their knowledge, any agreements by either of them to employ particular methods or to fix and maintain uniform prices and terms other than agreements as to what should be recommended for the N. R. A. Code. And it may be allowed that these officials did not

know of any agreements and even that no categorical agreements other than Code agreements were entered into, but the evidence discloses discussions, understandings, and co-operative activities, which, when considered with the results obtained by them, permit of no other conclusion than that of mutual understanding and acceptance of the plan and its objectives and of the intention of each to follow it.

(7-b2) Respondent Anaconda was not shown by direct evidence to have agreed to any pricing methods beyond the showing that its representatives were present at the committee discussions and the adoption of the Schedule A provisions. They introduced denial evidence as to agreements. Whether it agreed through mutual understanding, acceptance, and co-operation to employ the plan regardless of the Code and after the Code period must be determined from the character of its subsequent activities. It failed to employ the agency device in such manner as to enforce resale price conformity (Par. 5-b5), and it failed to employ the zone prices and differentials so as to produce matched prices with National and Eagle-Picher in the sale of white lead-in-oil and other keg products, but on these items its prices, though substantially lower than those of National and Eagle-Picher brands, were very close to the prices of Glidden and Sherwin on similar commodities (Par. 5-c6). Anaconda's zone, quantity, quality, and container differentials were the same as those of all other respondents. It also announced suggested resale prices to dealers which were identical with all other respondents. It was shown that Anaconda had the opportunity of securing prompt information as to competitors' prices and terms, that it was necessary for it to meet price reductions and desirable to meet price increases, and that it sold its 851 lead-in-oil brands at varying prices, but this does not explain away its price uniformity on dry white lead, its identical zone and other differentials, and its suggested resale prices. Agreement to employ these methods and to conform to National's prices within certain limits and to Glidden's and Sherwin's prices with a minimum of deviation appears clearly from these circumstances. In these particulars Anaconda went much beyond the bounds of normal competitive behavior, and it must be inferred that it entered into the general agreement and co-operated in effecting price uniformity.

(7-b3) Respondent Glidden did not conform in all re-

spects to National's and Eagle-Picher's zone-pricing methods, since it used shipping points from which customers paid the freight (Par. 4-d) and it made prices substantially different from those which could not be regarded as matched prices. It did not use any consignment plan until six years after its adoption, and this use was short-lived and not according to pattern. Glidden employed the various zone and other differentials, issued resale price suggestions identical with those of all other respondents, and based its lead oxide prices on Smelting's price for pig lead. Glidden produced evidence to negative agreements and showed the practicability of securing competitors' quotations promptly and the necessity of meeting them in such manner as would enable it to get business and make as large a profit margin as possible. It gave active competition within a limited price range, but it went beyond the requirements even of a limited competition by adhering to the exact zone and other differentials used by its competitors and in the simultaneous utterance of identical resale price suggestions. Its acceptance, assent, and employment of these methods and its co-operation in upholding the price structure of the other respondents and in maintaining price uniformity is apparent from the circumstances.

(7-b4) Respondent Sherwin conformed in part to the zone pricing plan as heretofore shown. It did not use the consignment plan for controlling resale prices, but it issued simultaneously with other respondents identical resale prices for the use of dealers. It also observed all of the quantity, quality, and container differentials and sold oxides on prices based on Smelting's price for pig lead. Sherwin's prices for white lead-in-oil were substantially under National's prices on its "Dutch Boy" brand, but they were approximately the same as those of Anaconda and Glidden for similar brands. On other products, such as dry white lead, Sherwin's prices were in line with National's. The entire price range was set by National, and other respondents were obliged to conform within certain limits, but in the exact observance of differen-
852 tials and in the simultaneous and identical price suggestions to dealers, Sherwin went beyond the requirements of competition to such an extent that agreement to co-operate in maintaining the price structure and lessening price competition is the more weighty inference (Pars. 4-d, e, 5-b5, 5-c5 to c6).

Conclusions as to Effects.

(7-c1) National's acquisition of the major portion of the lead pigment processing industry, its control by contract of the major portion of the domestic production of pig lead, and its agreement and co-operation with Eagle-Picher in maintaining identical prices and terms between them and in circumscribing the price competition of their smaller competitors and inducing a measure of conformity on the part of the latter to their prices, differentials, terms, and conditions of trade, had the tendency and effect of restraining trade, suppressing price competition, and creating monopolistic conditions (Par. 6-a).

(7-c2) The particular tendencies and effects of the zone pricing system as practiced by respondents were to enable all producers who desired to do so to match the prices of competitors and to produce identical prices in all zones to all buyers in a given trade class, or to vary therefrom according to consistent patterns. This had the tendency and effect of suppressing price competition and restraining trade as between them. The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost, so that they had an equal competitive advantage. This carries no inducement to sellers to maintain the same resale price, but had the beneficial effects contemplated by the Robinson-Patman Amendment. As between near-mill purchasers and others in the same zone, the flat zone price enlarges the areas of equal competitive opportunity and tends to distribute the locations of processing enterprises in a way that is economically healthful. But it was shown that the differentials between zones were often unfair as trade-restraining, since the price differences were more than differences in transportation or other costs (Pars. 6-b, c).

(7-c3) The zoning system did operate to prevent near-mill customers from having any special advantage over their competitors located at a distance. This cost the near-mill customer in the par zone 2.2% over an f. o. b. mill price and failed to extend his exclusive advantage from half-way to all the way to his far competitor's door. But respondents' failure to extend this special advantage
853 to near-mill customers does not, in the absence of

large freight factors, appear to involve substantial effects which would tend to lessen price competition. The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories (Pars. 6-a to d).

(7-c4) The effects shown throughout the record of the combined results of zone pricing consignment selling, uniform differentials, uniform terms and conditions of sale, were to produce identical prices, terms, and conditions of sale, were to produce identical prices, terms, and conditions of sale between National and Eagle-Picher and produce substantial uniformity of price differentials, terms and conditions by Anaconda, Glidden, and Sherwin, and prices by these three which varied according to pattern and according to differences of brand and quality. The various differentials and the oxide price formula operated to establish an inflexible price structure which eliminated variations in price based on quantity, quality, cost of delivery, container costs, or other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale. The price structure maintained by respondents is such that all delivered prices on the various grades, quantities, and qualities advance or recede with the change of one price factor. This facilitates price-matching, and has the tendency and effect of suppressing, restricting, and restraining price competition as between the sellers (Par. 6).

(7-c5) The practice of respondents in simultaneously announcing suggested resale prices at which dealers are expected to sell had the effect of discouraging and lessening price competition between their customers who could fail to be influenced by the knowledge that all of their limited sources of supply are interested in their maintaining price uniformity between themselves (Par. 5-b6).

Conclusions of Law.

(7-d1) None of the practices herein found to have been employed by the respondents come under the exemptions of the National Industrial Recovery Act for the reason that the provisions of the Code covering some of the practices were suspended by an exemption under Section 3(a) of the Act which was issued on application of respondents. This act was extended at their request, so that

these Code provisions were never effective during the existence of the Code Authority. The exemptions, under Section 5 of the Act, which applies to "any code, agreement, or license approved, prescribed, or issued and
854 in effect under this title, and any action complying with the provisions thereof taken during such period * *", do not apply to any agreements or methods not protected by a Code provision which was in effect at the time they were entered into and employed within the exemption period thereafter. Other of the practices were never adopted and incorporated in the Code or supplemental code, and were not protected by this Act either during or after the Code period. Practices covered by the provisions which were adopted and suspended, as well as the other practices, were also employed before and more than sixty days after the termination of the Code and the expiration of the exemption period provided in Section 5 (See *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 Fed. (2) 899).

(7-d2) The acts and practices set forth in Pars. 7-b1 through 7-b4 constitute conspiracy by all respondents to fix and maintain uniform prices, differentials, terms, and conditions of sale in the lead pigment industry, which conspiracy was carried out by all respondents through the various methods heretofore shown. While some of the respondents were not shown to have employed all of the particular methods alleged and considered, and while there were some variations in practice and results as between respondents, the evidence is clear and substantial that each respondent went beyond the requirements of competition, and beyond the requirements imposed by National's price leadership, in the matter of identical bidding and in practice of the various methods which they had discussed together, and in the institution and maintenance of a uniformity of prices, terms, and conditions of sale, all of which could not have resulted from other than agreement and conspiracy (See *Eastern States Lumber Ass'n* case, 234 U. S. 600; *Frey & Sons* v. *United States,* 256 U. S. 208; *Wholesale Grocers of El Paso* v. *Federal Trade Commission,* 277 Fed. 657; *United States* v. *Schenck,* 253 Fed. 212, 249 U. S. 47 and cases there cited).

(7-d3) The acts and practices of respondent National in acquiring competing units of the lead industry, and in resorting to monopolistic practices by unduly influencing the price of pig lead, in monopolizing the major portion

of the domestic supply of pig lead, and in monopolizing the major portion of the production and sale of oxides and lead pigments so as to enable it to control prices, terms, and conditions of trade and restrict price competition, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d4) The acts and practices of all respondents in agreeing and co-operating to influence uniform resale prices on the part of dealers by the simultaneous utter-
855 ance of identical resale price suggestions constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d5) The acts and practices of all respondents in agreeing and co-operating to effect uniformity of prices, terms, and conditions in the sale of lead pigments by adopting and employing uniform zone prices and identical zone, quantity, quality, and container differentials and by uniformly basing prices of lead oxides on the prices of American Smelting & Refining Company for common pig lead, constitute conspiracy to restrict price competition between themselves, and had the tendency and effect of restraining trade to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

(7-d6) The acts and practices of respondents National and Eagle-Picher in agreeing and co-operating to produce and in producing identical prices in the sale of lead pigments by their dealer customers, through the use of consignment agreements with said dealers, constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Count Two.

The first charge in the count, numbered 8 in the outline, is that the zone pricing discriminates in price (a) between customers located in the same zone, and (b) between customers located in different zones, the customers being in competition with each other, and the price differences not being justified by differences in cost.

The second charge (No. 9) alleges discriminations arising out of differences in price effected through different trade, regional, and quantity discounts.

The facts relating to zone pricing, price differences, differentials, and other features bearing on the issues under this count which are set out in the Report on the Evidence under Count One, are adopted and applied to the issues under this Count, except that the facts of interstate commerce heretofore set out are adopted and applied to "commerce" as the term is defined in the Clayton Act. Other facts and their bases will be considered as cited.

(8-a1) The facts heretofore set out show that the flat price in a given zone is a delivered price which is paid by the customer for two economic values or "goods",
856 (1) the commodity produced at the mill, and (2) transportation. As between customers at different locations the cost of transportation varies, while the cost of the commodity at the mill is the same. But the net mill price of the commodity varies inversely with the freight cost, so that the two combined are equal to the fixed delivered price. That is, $P = F + N$, wherein P is the delivered price, F is the actual freight or delivery cost, and N is the net amount received by the mill for the commodity. The net price (N) is made to vary irrespective of its uniform cost, and the price of F is made the same irrespective of differing costs. There is no base price to which varying amounts of freight are added, but the delivered price is based on raw material, production, and selling costs plus an average freight factor, which gives the near as well as the distant customer the same total price. Where the average freight increment of the price to near-mill customers is more than the actual cost of delivery, the seller receives a profit on the freight which increases his mill net; but where the distant customer receives more freight value than the average freight factor in his price, mill net is shrunk by the amount the freight paid exceeds this factor (Pars. 4-a to c). The delivered price in a premium zone may be expressed as $P = N + (F + X)$, in which F is the average par zone freight factor and X is the zone differential. The first equation is the analytical expression of a uniform delivered price as between customers, and the equation last given is that of a differing delivered price.

(8-a2) Shipments made by respondents between various points during the period from January to March, 1941, show the following maximum variations in price and price factors applying to white lead-in-oil per 100 lbs., P being the zone delivered price, N the mill net or realized price for the product, and F the actual freight cost.

Par Zone.

From Chicago to Wheeling, W. Va.	P $9.75	F $ .56	N $9.19
From Chicago to Milwaukee, Wis.	P 9.75	F .29	N 9.46

(Here Milwaukee is 27¢ freightwise nearer the mill, but it pays 27¢ per 100 more than Wheeling to own the goods at the mill, or 27¢ more freight to respondents for the shorter haul than it would have to pay the railroad.)

857 Second Zone, 12.5¢ Over Par.

From St. Louis, Mo., to Sioux City, Ia.	P $9.875	F $ .89	N $8.985
From St. Louis, Mo. to Kansas City, Mo.	P 9.875	F .29	N 9.585

(Kansas City pays 60¢ per 100 lbs. over Sioux City.)
(CX 752-Z111, Z114.)

Third Zone, 25¢ Over Par

From St. Louis, Mo., to Fargo, N. D.	P $10.00	F $1.19	N $8.81
From St. Louis, Mo., to Union City, Tenn.	P 10.00	F .50	N 9.50

(Union City pays 69c more at the mill.)
(CX 752-Z113, Z115.)

Fourth Zone, 37.5¢ Over Par

From Chicago, Ill., to Atlanta, Ga.	P $10.125	F $ .63	N $9.495
From Philadelphia, Pa., to Charleston, S. C.	P 10.125	F .89	N 9.235

(Atlanta pays 26¢ over Charleston.)
(CX 752-Z10, Z67.)

Fifth Zone, 50¢ Over Par

From St. Louis, Mo.
to Oklahoma City, Okla. P $10.25 F $1.08 N $9.17

From St. Louis, Mo.,
to Denver, Colo. P 10.25 F 1.47 N 8.78

(Oklahoma City pays 39¢ per 100 more at the mill.)
(CX 752-Z112, Z113.)

Sixth Zone, 75¢ Over Par

From St. Louis, Mo.,
to Amarillo, Texas P $10.50 F $1.47 N $9.03

From St. Louis, Mo.,
to Dallas, Texas P 10.50 F .55 N 9.95

(Dallas pays 92¢ more for 55¢ worth of freight, or for its lead-in-oil at the mill.)
(CX 752-Z112, Z113.)

858 Seventh Zone, $1.00 Over Par.

From St. Louis, Mo.,
to El Paso, Texas P $10.75 F $1.77 N $8.98

(El Paso pays a mill price of 97¢ less than Dallas, which is 500 miles nearer the shipping point.)
(CX 752-Z-115.)
(Freight data taken from CXs 742, 749, and 751-A and -B.)

(8-a3) As shown above, discriminations based on differences in mill net may be in favor of the purchasers in the distant zone, who receive much more in transportation value. The advantage to El Paso, as shown above, was less by $1.00 because of the differential. But in border territory, as between St. Louis, Missouri, and near points where the freight is negligible, the different prices resulting from the additions of ½ or ¼¢ per lb. involved a discrimination against customers so located by the added amounts, and would lessen their ability to sell and ship back towards St. Louis. These results follow selling into a premium zone from a lower pricing zone; or from the same premium zone, and were not shown to have been based on differences of delivery or other costs, although the differing prices were uniformly quoted and charged (Count One, Par. 4; CXs 752, 754, 772, 852-854; Tr. 1702, 1736,

1825, 2012, 1340, 1361, 1676, 1696, 1369-79, 1981-94, 1878-85, 2000; RX 214; and *supra*). National sold oxides from its plants in Dallas, Texas, and Atlanta, Georgia, to nearby battery manufacturers and others in the same zones at the zone premium of ½¢ per lb. Some deliveries were by truck in the same city as the plant, and others were at negligible distances freightwise (CXs 813, 847, 853; Tr. 1576-82, 1596, 2022; Par. 5-c4).

(8-a4) Eagle-Picher shipped oxides and other pigments from its borderline plant in Joplin, Missouri, to near and far points in different zones. For keg products this plant is in the 12½¢ zone and is about 15 miles from the 25¢ and 50¢ zones. The 37½¢ zone is about 40 miles distant. For oxides the plant is in the par zone and about 10 miles from the borderline of Oklahoma, which is in the 25¢ zone (See maps). Except at Texarkana, Texas, a border city near Texarkana, Arkansas, Eagle-Picher sells from this plant at the zone prices (Tr. 1549, 1550-1; CX 752-Z116).

It sells to battery manufacturers large and small, and employes quantity differentials (Tr. 1599, CX 854. See also Tr. 1363, 1547-9, 1564, 1570-90, 3415, 3659). The following prices and freight factors per cwt. were shown 859 for shipments of red lead to battery manufacturers from the Joplin plant:

Destination	Zone Differential	Freights
Nashville, Tenn.	0	.535 CL
Birmingham, Ala.	.25	.625 CL
Omaha, Neb.	0	.195 CL
Minneapolis, Minn.	0	.38 CL
New Orleans, La.	.25	.45 CL
Council Bluffs, Ia.	0	.76 L 5-ton
O'Keene, Okla.	.25	.73 L 5-ton
Tulsa, Okla.	.25	.44 L 5-ton
Stotts City, Mo.	0	.25 L 5-ton

(CX 854; Tr. 1549-1599.)

Prices and rates are those prevailing from October 1 to December 31, 1941, as shown by CXs 659 through 663 and elsewhere. Commission's Exhibit 844 shows other shipments reflecting similar relations between differing prices and freight. As between these zones, freight differences do not appear to bear any relation to price differences (Id.).

Discriminations Through Differentials.

(9) As to differences in trade, regional quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between carloads, 5-ton lots, and smaller quantities, the evidence heretofore set out in Count One will be considered and cited on the issues involving price discrimination.

(9-a) Respondents National, Eagle-Picher, and Anaconda charged consignment dealers in the par zone $1.00 less per cwt. on white lead-in-oil than its price to competing dealers in the same locations (Par. 5-c5), (Tr. 2960, 2961-3, 3005-7). It was shown that profits on this item were close and that the differential was of substantial competitive value (Id.). No justification was shown. In fact, consignment selling appears to be more trouble and expense than selling to dealers who buy and own their own stocks (5-b4).

(9-b) All respondents were shown to have maintained differentials of 25¢ between 100-lb., 50-lb., 25-lb., and 12½-lb. containers of 100 lbs. of keg products. These differentials were shown to be no more than differences in the cost of containers, packaging, and handling, and were therefore not discriminations in price. No effects other than those charged in Count One were shown (Par. 5-d; RX 309; Tr. 4175-6).

860 (9-c) Quality differentials on red lead Pb_3O_4, of ¼¢ per lb. for 97% over lower grades, and ½¢ over for 98%, were shown by many quotations and invoices to have been quoted and charged by all respondents except Anaconda (Par. 5-f). These higher grades of red lead were shown to have required extra processing and thus to involve extra costs which were as much or more than the differentials charged (RX 209; Tr. 3871 through 3882). No lessening of competition or tendency thereto through these differentials was shown.

(9-d) All respondents quoted and charged different prices as between carloads and smaller quantities of oxides. The car price was based on Smelting's price for common pig lead and the card price for smaller quantities involved a difference of 90c per cwt. under the car price except that ¼¢ per lb., or 50¢ per cwt. under the card price, was allowed for 5-ton lots. The differentials over car prices were, therefore, 40¢ per cwt. for 5 tons and 90% per cwt. for smaller quantities. (Par. 5-c10).

These price differences in a substantial number of cases were much more than the differences between car and less than car freight rates, and resulted in excess of charge over delivery cost as high as 88¢ per cwt. against the purchaser of small quantities.

The following prices and rates per cwt. show representative results and include shipments by respondents National, Eagle-Picher, and Glidden:

Origin	Destination	Unit	Price Difference ¢	Freight Difference ¢	Lack of Justification ¢
St. Louis	Birmingham	CL	0		
St. Louis	Birmingham	5-ton	40	35	5
Dallas	San Antonio	CL	0		
Dallas	San Antonio	L 5-ton	90	50	40
San Francisco	San Francisco	CL	0	0	
San Francisco	San Francisco	5-ton	40	0	40
Hammond	Chicago	CL	0		
Hammond	Chicago	5-ton	40	4	36
Hammond	Chicago	L 5-ton	90	4	86
Detroit	Detroit	CL	0		
Detroit	Detroit	L 5-ton	90	2	88
Cleveland	Akron	5-ton	0		
Cleveland	Akron	L 5-ton	50	3	47
Chicago	Chicago	CL	0		
Chicago	Chicago	5-ton	40	2	38

(CXs 852-A, B, F, O, 854-C).

861 The foregoing shipments were of red lead. Rates and differentials on litharge were the same, and the prices $1.00 less in all billings. The freight rates on 5-ton and smaller lots were the same. Consequently the lack of justification on shipments under 5 tons can be determined by adding 50¢ to the 5-ton discrimination. This reveals a price difference of 50¢ or more over freight differences at all points, and no case where the differential between 5-ton and smaller shipments is justified. Respondents' own estimates shown for dry white lead indicate an increased cost of about ½¢ per lb. against less than car lots, but this figure applied to oxides would fall far short of justifying the 90¢ differential in any case, or the 40¢ charge in most cases. (See finding below re RXs 215, 217.) An additional discrimination of 25¢ per cwt. against less than car shipments of oxides was made in shipments to customers in Montana, Wyoming, Colorado, and New Mexico, since these states

are in the 50¢ zone for small shipments and in the 25¢ zone for car lots (See maps 3 and 4; CX 854-B, C).

(9-e) All respondents sold basic lead carbonate (dry white lead) at ¼¢ per lb. under card prices on carload shipments (20 tons or more). This difference is in the majority of cases less than the difference between car and less-than-car freight rates.

Shipments involving points selected at random and considered on the basis of the freight rates contained in Commission's Exhibits 742 and 751-B show the following relations between the 25¢ quantity differential and the difference in freight:

Origin	Destination	CL Rate ¢	LCL Rate ¢	Freight Difference ¢	Justification ¢
Chicago	Atlanta	63	105	42	+17*
Chicago	Buffalo	30	61	31	+ 6
Chicago	Cincinnati	24	48	24	— 1
Chicago	Cleveland	25	51	26	+ 1
Chicago	Detroit	23	46	23	+ 2
Chicago	Pittsburgh	29	59	30	+ 5
Brooklyn	Boston	24	48		— 1
Philadelphia	Baltimore	16	32	16	— 9
St. Louis	Chicago	19½	46	26½	+ 1½
St. Louis	Dallas	55	126	71	+46
St. Louis	Omaha	29	78	49	+24
St. Louis	Kansas City	19½	51	31½	+ 6½
St. Louis	St. Paul	34	88	54	+29

* This results from subtracting the 25¢ CL differential from the freight difference. (CXs 742, 761-B, 751, 752).

862 The minus quantities given above show lack of justification. The largest one amounts to 1/9 of a cent per pound, and sales to the great majority of points show that respondents usually take a freight loss on the smaller quantities. Respondents also introduced a tabulated study of the differences in average sales and freight costs between car and less than car shipments. This is based on sales from National's Atlantic branch, and lacks sufficient detail to reveal exact differences. It is, however, taken as an estimate of cost differences to show an average cost excess of about ¼¢ per lb. on less than car over car shipments of dry white lead. The freight figures tabulated above and numerous others in the record indicate that this estimate

is approximately correct (RXs 215-A, B, 216; Tr. 4135-79, 4160).

(9-f) All respondents employed a price differential of ½¢ per lb. between 500 lbs. and less on white lead-in-oil and other keg products. This bore no relation to freight differences, as both quantities bore the same LCL rate. No other cost differences between these quantities were shown.

Effects of Discrimination.

(10-a) The effects of zone differentials in border territory and of added amounts for shipments originating and terminating in the same premium zone was shown to increase the cost of oxides from ½¢ to ½¢ per lb. over prices charged other customers, which differences were not based on differences in transportation or other costs (Par. 8-a3). To these effects was added, as against the less-than-5-ton purchaser, small battery manufacturers in the Birmingham territory, a quantity differential of 55¢ per cwt. (90¢ less a freight difference of 35¢) (CX 853-B). Similar discriminations in varying amounts over ½¢ per lb. are seen from a comparison of items shown in Paragraph 9-d and in Commission's Exhibits 853-A to I, 854-A to C. The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were 90¢ quantity differential plus a 25¢ difference between car and LCL zoning, less 71¢ freight difference, or 44¢ per cwt. (CX 854-B, G), to which may be added ½¢ as compared with a nearby competitor in Kansas or in other locations carrying the same or less freight costs (Map 3). These unjustified differentials amount to ½¢ per lb. or more in a substantial number of cases (See Pars. 8-a3, 9-d).

(10-b) It was shown that oxides were used by large and small battery manufacturers, and that batteries contained from 9 to 12 lbs. each of lead oxides. These discriminations approximating ½¢ per lb. on the lower-priced 863 oxides, amount to from 4½¢ to 6¢ per battery for the oxides alone (Tr. 1677, 1680, 1717, 1755, 1797, 1839, 1846). Three battery manufacturers, located in Chicago, testified that a saving of from 5¢ to 10¢ per battery would not have a substantial effect on their competitive position. The President of one of these said a 5¢ to 10¢ savings would not be substantial, but admitted that sometimes his profit might have been less than 25¢ per battery (Tr. 1798,

1803). The President of another, the Volta Battery Co., said he wouldn't let a nickel per battery stand in his way, and that National had helped him start in business (Tr. 1866-69). The Manager of Franklin Storage Battery Co., which makes batteries and battery plates for other battery manufacturers, testified that ½¢ per pound would not be "a drop in the bucket" on battery costs, but would make a "lot of difference" in the costs and profits in the manufacture of plates (Tr. 1898-9). Ten small battery manufacturers situated outside of Chicago testified that a saving per battery of 5¢ to 10¢ would be of competitive advantage to them (Tr. 1732, 1761, 1770, 1776, 1732-6, 1840, 1880, 1899, 1923, 1909, 2004, 2015, 2024). Battery manufacturers operating in Birmingham, Alabama, Dallas, Texas, and Nashville, Tennessee, were shown to be in competition with chain and mail-order battery producers and others purchasing at par zone prices (Tr. 1949-50, 1995-8, 2023, 1935, 1972, 1979, 1984).

(10-c) Four paint manufacturers of St. Louis, Missouri, testified as to conditions in their trade. They used variously from 4½ to 8¼ pounds of lead pigments to a gallon of white or tinted outside paint, and from 14 to 20 pounds of red lead in red paint (Tr. 1338-65, 1366-87, 1381, 1389-1410, 1397, 1415-18). These manufacturers were in the par zone but were in competition with other concerns likewise engaged and which are located in the states of Texas, Louisiana, Arkansas, Oklahoma, Mississippi, Kansas and Tennessee (Tr. 1352-5, 1363, 1367-8, 1376, 1423-7, 1398). Officials of the Mound City Paint & Color Co., of St. Louis, Missouri, testified that a 5¢ per gallon saving would be equal to his profit on many items and would enable him to sell further from his plant (Tr. 1360). The Vice President of St. Louis Surfacer & Paint Co. swore that a matter of a few cents per gallon would determine the business in many instances and that a saving of 5¢ to 10¢ per gallon would enable him to extend his business (Tr. 1429-30). The President of Steelcote Manufacturing Co., of St. Louis, Missouri, testified that "5¢ per gallon would not be a great saving and would not make very much difference, but 10¢ would be more" (Tr. 1402). Witness J. P. Haddock, Secretary of Vane Calvert Paint Co., St. Louis, said that a 10¢ per gallon saving might be a factor in getting business in ordinary times, but that 5¢ would not be enough in a competing area (Tr. 1378).

864 (10-d) The price difference on red lead of ½¢ or more between car and less-than-car shipments made a difference to small paint manufacturers of 7¢ to 10¢ per gallon (Par. 9-d). On dry white lead it is not clear that there is a substantial unjustified quantity differential between CL and LCL purchasers (Par. 9-e). The zone differential between Dallas and St. Louis is ½¢ on less than car lots of red lead, and nothing on carlots. This makes a total cost difference of about ¾¢ per lb., or about 10¢ to 15¢ per gallon of red paint as between the small Dallas manufacturer and the large manufacturer in St. Louis. There is no price difference on oxides in car lots between the two cities. As between large and small paint manufacturers at all points in the ½¢ zone, there is an unjustified price difference of ½¢, or about 5¢ per gallon of red paint (Par. 8-a4, Maps 3 and 4). On dry white lead the paint manufacturers of Dallas, St. Louis, Birmingham and other points in the par zone, as shown on Map 2, pay the same delivered price and are all on an equal competitive basis. There are some discriminations in favor of par zone manufacturers against nearby manufacturers in the ½¢ zone for dry white lead.

(10-e) In the sale of lead-in-oil and other keg products, the quantity differential of ½¢ per lb. as between 500 lbs. and less was not shown to have any basis in differences of costs of any kind. The difference between consignment dealers' prices and those of other dealers was not shown to be based on differing costs, and gave the consignment dealer an advantage of 1¢ per lb. over competitors in the same location. Differences in mill nets resulting from shipments from par points to par destinations or from par points to premium zone destinations where the added increment was no more than the additional freight were not shown to have involved local price or cost disadvantages as between dealers at the various points. And it was not shown that there was any such disadvantage to any processors of keg products.

(10-f) As between respondents, the zone prices, as well as the quantity, quality, and container differentials, appear from all the evidence to have had the tendency and effect of producing uniformity of prices and lessening price competition between themselves. This results from the uniform employment of the methods as the result of a general understanding, acceptance and voluntary employment of the plan, and not from discrimination per se (See Count One).

865 Conclusions and Reasons.

(10-g) Respondents' intra-zone prices involving differences in mill nets and average freight increments latent in the delivered price amounting to no more than 2½% to 3½% of the same, which delivered price was the same to all customers in the zone regardless of distance, were not shown to have lessened competition between these customers. The theory of the complainant is that purchasers located near production and shipping points paid prices yielding the highest mill nets and were the ones receiving the maximum disadvantage. But these were claimed and shown to be the principal ones who were crowding the distant manufacturers of batteries and paints to the competitive wall. Were they given an f. o. b. mill price equal to that of their distant competitors and thus enabled to enjoy a predominating advantage up to the door of these competitors and an equal advantage in all of the distant competitors' territory, the small concerns located further from shipping points would be run out of business, and the competition now afforded by these would be destroyed. This would impose on the distant purchasers the necessity of choosing between moving to the source of supply or going out of business (Pars. 4-a to e, 8-a2, 8-a4). In the absence of excessive freight factors which would produce higher prices to the public and substantial economic disparities between customers, it cannot reasonably be inferred that the prices here employed intra-zone lessen competition between customers to a substantial degree.

(10-h) Respondents' inter-zone prices are in fact different prices. They differ to the extent of the zone premiums, and are justified only where the additional freight equals or exceeds the zone premium. Where the differences in freight or other costs do not equal or exceed the differences in price, they are discriminatory. In a substantial number of cases the zone prices were not so justified. Cases pointed out in Paragraphs 8-a3, a4, 10-a, d, and elsewhere are discriminatory, and such discriminations, in numerous cases, were shown to be substantial and sufficient to lessen competition between respondents' customers (Par. 10-a to e).

(10-i) The different charges made by respondents based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs, and

were therefore not discriminatory prices. These charge variations were the same to all customers and had no effect on competition between customers (Par. 9-b). Respondents' differing charges between grades of red lead as shown in Paragraph 9-c were no more than corresponding differences in cost as between the grades. The prices were given to all customers, and had no effect on competition between customers.

866 (10-j) The differing prices between carloads of oxides and 5-ton lots, and between these and smaller quantities, which were charged by all respondents except Anaconda, and the extra zone charge for less-than-car quantities in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by differences in costs of manufacture, sale, or delivery, and were therefore discriminatory. The effects of these were shown to be substantial and to have the tendency and effect of lessening competition between large nad small customers, to the injury of the latter (Pars. 9-d, 10-a to d).

(10-k) The differential charged by all respondents on basic lead carbonate (dry white lead) of ¼¢ per lb. between car and less-than-car shipments was no more than differences in the cost of sale and delivery of said products. No lessening of competition between customers was shown to have resulted from this practice.

(10-l) The differential of ¼¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not not shown to be justified by differences in cost of any kind. In the retailer and painter trade where this was applied, the differential does not appear to have substantial effects, since the purchase of the larger quantity involved approximately the outlay of $50 and was within the reach of the smallest dealer. No competition was shown between customers who bought the different quantities, and no inference of injury can be drawn with respect thereto.

(10-m) The discrimination set out in Paragraphs 10-h and 10-j were not shown to have lessened competition between sellers. The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers. Effects arising from co-operatively employing the same discriminations, or from employing the same methods which are not discrimina-

tory but which produce identical prices, are considered and disposed of under Count One. It is not thought, therefore, that the discriminatory acts of any individual respondent had the effect of lessening competition between it and other respondents except as the same were collusively employed.

Conclusions of Law.

(11-a) The employment by each respondent of interzone price differentials where the price differences were more than differences in freight or other costs, as shown in Paragraph 10-h, and where the differences, as shown, were substantial, had the tendency and effect of lessen-
867 ening competition between customers of the sellers and of creating a trade advantage in favor of customers in the par zone or elsewhere who received the lower prices. In these instances all of the unequal features of "phantom freight" were present, and customers so discriminated against were disadvantaged competitively at all points. The practice in the circumstances shown is violative of the Clayton Act as amended (49 Stat. 1526; 15 U. S. C. A. Sec. 13; *Sugar Institute* v. *United States*, 297 U. S. 553, 591, 605. See also *Western Union* case, 181 U. S. 92).

(11-b) The employment by all respondents except Anaconda of differentials between carloads, 5-ton lots, and smaller quantities of oxides, and the imposition of an additional ½¢ per lb. charge on less than car lots in the states of Montana, Wyoming, Colorado, and New Mexico, as set out in Par. 10-j hereof and in the base material cited, were not justified by any differences in costs and were discriminations between large and small customers which lessened competition between them, and are in violation of the Clayton Act as amended (*supra*). (See *Corn Products Refining Company* v. *Federal Trade Commission*, 324 U. S. 726, and cases there cited.)

(11-c) The employment by an individual respondent of a flat delivered price in a specified territorial zone where, as in this case, the delivered prices were based on average delivery costs for the zone, and where no substantial lessening of competition was shown in any line of commerce in which customers of the seller were engaged, does not come under the prohibitions of Section 2(a) of the Clayton Act, as amended. The delivered prices employed

were not derived from any formula involving varying amounts of freight from arbitrary or actual shipping points to be added to an f. o. b. mill or base price, such as used and considered in the case of *Corn Products Refining Company* v. *Federal Trade Commission*, 324 U. S. 726. Nor were the effects shown in that case the same as in the instant case. In the *Corn Products* case a base price, substantially an f. o. b. mill price, given the favored near-mill customers in Chicago was the measure of discrimination against those distant competitors whose prices were increased by different amounts in excess of the actual costs of transportation. In this case, costs are equalized between all customers in a zone, so that no one is at a competitive disadvantage. And so the situation which the Commission sought to relieve in the *Corn Products* case—that of the near-mill customer having an undue advantage of location—is relieved by the respondent who uses an equalized price based on reasonable factors."

868 The court said, in the Corn Products case:

"Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago."

The question here is not whether a base or f.o.b. mill price which produces differing prices is unlawful, but whether the absence of differing prices and of f.o.b. mill price bases is unlawful where such absence insures equal costs to all customer competitors in a zone. The purpose of the Clayton Act is not to force lower prices or even to forbid the inclusion of arbitrary cost factors which normal competition would eliminate. But the Act is directed to the securing of such treatment of customers as will enable them

to be on an equal competitive basis. It did not seek to protect natural advantages of location. They need no protection. The Federal Trade Commission Act, based on the policy underlying the Sherman Act, seeks to enhance competition and produce differing prices, but Section 2(a) of the Clayton Act is a limitation on such differing prices as may be sufficient to protect customers from unequal costs, so that they may sell on equal terms with their competitors. Price for the purposes of the Clayton Act, in the absence of uneconomic or unlawful factors, is the total price or cost to the customer, for this is the essence of his ability to compete. Whether or not the supplier makes a large or a small mill net is of no consequence on the single question of equal prices between competing customers. In this case the Commission is asked to forbid the equalized price and thus force the maintenance of a "favored price zone" which would prevent a seller from building his business on the firmer foundation afforded by an increased number of customers and territorial outlets, and would tend to eliminate all processors not located at sources of supply. It would
869 require a strained construction of the Clayton Act to force sellers to maintain inflexible mill nets, and such a construction would tend to restrict competition as between sellers, and would be in conflict with the Sherman Act.

In discussing the rejected provision of the Robinson-Patman Bill which defined "price" as "the amount received by the vendor after deducting actual freight or other cost of transportation", the Corn Products opinion says:

"Such a drastic change in existing price systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing points systems illegal per se."

(See also *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563; *Cement Manufacturers Association* v. *United States*, Id. 588; *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 144 Fed. (2) 221 and cases there cited.)

It is clear from these opinions and from other cases cited therein that intra-zone pricing by an individual seller employed as shown in this case is one of the methods which Congress did not wish to forbid and that it is not unlawful under the Clayton Act.

(11-d) The acts and practices of respondents set out in Paragraphs 10-i, 10-k, and 10-l were, for reasons there stated, not in violation of the said Clayton Act. The differences between car and less-than-car shipments of basic lead carbonate, the container differentials, the quality differentials for red lead, and the differentials between 500 lbs. and less on keg products are no more than "differences which normally arise in the buying of smaller or larger quantities" or in the buying of different qualities (*Morton Salt Co.* v. *Federal Trade Commission*, 162 Fed. (2) 949; *Corn Products* case, *supra*).

870 IV. Recommended Findings and Conclusions.

The undersigned Trial Examiner recommends that the Commission adopt as its report the foregoing report upon the evidence excepting such portions as it may eliminate or alter and assign reasons or bases therefor, and that it make the following findings as to the facts based on the same and on the entire record, to wit:

Paragraph 1-A: National Lead Company, hereinafter referred to as "National", is a New Jersey corporation with its principal offices at 111 Broadway, New York, New York. The names "John T. Lewis Company" and "Evans", designate divisions of National's business, and are hereafter used in connection with its transactions.

Paragraph 1-B: The Eagle-Picher Company referred to in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation with its principal offices at the American Building, Cincinnati, Ohio. The Eagle-Picher Sales Company, a Delaware corporation having its principal offices at the same address, is a wholly-owned subsidiary of Eagle-Picher. Both of these companies will be hereafter referred to as "Eagle-Picher". The terms "Hammar" and "Eagle" are terms appearing in the evidence to designate the products of this company.

Paragraph 1-C: The Anaconda Copper Mining Company is a Montana corporation with its principal office located at 25 Broadway, New York, New York. The International Smelting & Refining Company, a Montana corporation with its principal office at the same location, is a wholly-owned subsidiary of Anaconda Copper Mining Company, either or both of which companies will be hereafter referred to as "Anaconda". Prior to the organization of International

in 1936, Anaconda operated through its subsidiary, Anaconda Lead Products Company. International sold its lead pigment plant and business to Eagle-Picher in 1946, and Anaconda was not thereafter in the lead pigment business.

Paragraph 1-D: The Sherwin-Williams Company, hereafter referred to as "Sherwin", is an Ohio corporation having its principal offices at 101 Prospect Avenue, N. W., Cleveland, Ohio.

Paragraph 1-E: The Glidden Company, hereafter referred to as "Glidden", is an Ohio corporation having its principal offices at Union Commerce Building, Cleveland, Ohio. The term "Mamolith" is a trade name of respondent Glidden, and the Metals Refining Company is the name of one of its divisions.

871 Paragraph 1-F: The aforesaid respondents are manufacturers and sellers of lead pigments, which term, as used in the pleadings and the record, includes (1) oxides, consisting of litharge and red lead, which is produced by burning litharge, (2) basic lead carbonate sold as dry white lead or lead-in-oil, and (3) basic lead sulphate, sometimes used as a substitute for basic lead carbonate. Lead oxides and basic lead carbonate are manufactured from corroding pig lead which differs from common pig lead in that it is desilverized. Basic lead sulphate is usually made from common pig lead, but can be manufactured directly from ores. Oxides in the form of red lead are sold dry or in oil. Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others.

National produces dry white lead in 5 types, all of which are sold at the same prices and discounts, and are interchangeable for some purposes. Other respondents produce different qualities of these products, which they claim are superior to those put out by National. Battery manufacturers preferred some brands of lead oxides over others, and some held the opinion that oxides produced by different respondents are different in quality and chemical characteristics. For paint manufacturers the pigments made at different plants contain important differences. These respondents produce practically all but a small quantity of the lead pigments produced and sold in the United States, except that Anaconda and International have not been engaged in the lead pigments business since the fall of 1946. Eagle-Picher and Anaconda do only a limited amount of

business on the Pacific Coast and in states west of the Rocky Mountains. Anaconda sold no oxides, and Sherwin did not sell oxides to battery manufacturers.

Paragraph 1-G: Each of the respondents is now and has for many years been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, selling and shipping lead pigments manufactured at the various producing points hereinafter set out to customers located in other states of the United States than the state of production and shipment in a continued flow of interstate trade and commerce.

Paragraph 1-H: Immediately after its organization in December, 1891, respondent National acquired 16 companies previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products. In February, 1906, National acquired the United Lead Company, which had been organized in 1903 by Grant Hugh Brown, Daniel Guggenheim, and Thomas F. Ryan, and 872 which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works, not theretofore taken over by National, and including also the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. Most of the concerns acquired by National through the purchase of United had been offered previously to National by Messrs. Guggenheim, Ryan, and H. H. Rogers, the two first named being directors of Smelting. At this time, and until 1911, Smelting was given representation on National's Board of Directors through Daniel Guggenheim, Murray Guggenheim, and Edward Brush, who were also directors of Smelting. Thereafter National acquired the Carter White Lead Company (1906), the Matheson Lead Company (1912), the River Smelting & Refining Company (1915), the Bas-Hunter Paint Company (1916), and the Hirst & Begley Company (1919), and in about 1944 it acquired the Evans Lead Company at Charleston, West Virginia, which continued to produce litharge and red lead to the extent of about 10% of National's production.

Paragraph 1-I: Prior to those acquisitions by National, there were 18 or 20 producers of white lead who were selling in their various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged existing plants. The names of some of the acquired properties were retained and oper-

ated by National as branches. National thereafter controlled and operated branches and plants located in New York, N. Y.; St. Louis, Mo.; Dallas, Texas; Omaha, Neb.; Buffalo, N. Y.; Philadelphia, Pa.; Boston, Mass.; New Orleans, La.; Cincinnati, Ohio; Cleveland, Ohio; Atlanta, Ga.; Pittsburgh, Pa.; San Francisco, Calif.; and Chicago, Ill.

Paragraph 1-J: National's percentage of the production of the entire industry in the United States from 1936 to 1941 were estimated as follows:

White lead-in-oil	60%
Dry white lead	30% to 35%
Oxides (red lead and litharge)	50%

In 1943 National produced 60% of the white lead-in-oil and in 1932 it may have gone as high as 70%, but in other years the percentage varied with a downward trend. Shipments of white lead, dry and in oil, for the years 1938 through 1941 were shown to reflect the following comparative average per centages for the entire United States for the four-year period:

873 National	55.475%
Eagle-Picher	13.35%
International (Anaconda)	7.625%
Fuller	3.225%
McGregor	1.2%
Sherwin and Glidden combined	19.025%

Eagle-Picher is here shown to be National's largest potential competitor in this line, and their combined production for the years considered was 68.825% of the domestic output, which percentage has been increased by the recent acquisition by Eagle-Picher of International's lead pigment plant and business.

National's prices, terms and conditions of sale were followed generally by all of its domestic competitors. National became a predominant factor in the industry, and its competitors felt compelled to follow its prices and terms to a considerable extent. National advertised its "Dutch Boy" brand and made it a standard, leader, and price criterion in the trade. Its facilities for production were at all times adequate to satisfy the entire market demand for white lead.

Paragraph 1-K: It was shown that National owned vari-

ous amounts of the capital stock of Eagle-Picher, and that in June, 1932, it owned 44,900 shares of the total outstanding 900,000 shares of the common stock. It realized a gross profit of $861,981.53 on these investments. It is not shown that National ever controlled Eagle-Picher through these holdings, or that it was ever represented on the latter's Board of Directors. National made an unsuccessful attempt in 1931 to purchase the assets and goodwill of Eagle-Picher. There is direct evidence of close relations between these two respondents. Eagle-Picher's executive vice-president, Mr. W. R. Dice, in 1937, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. Wormser, Secretary of the Association, had invited him. Eagle-Picher's files contained National's price changes on the Pacific Coast, and in 1940 Eagle-Picher submitted labels, prices, and description of its new white lead paint to National and referred to a previous conversation about the matter. This was followed by a luncheon between the parties. Eagle-Picher's Chief Chemist, Mr. Chinery, wrote Mr. Rose, of National, suggesting the increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications". In 1941 National wired Eagle-Picher its Manila prices for white lead in oil and red lead. Other evidence of co-operation between these two appears below.

874 Paragraph 2-A: Respecting the transactions between National and American Smelting & Refining Company, hereafter termed "Smelting", it was shown that the latter, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries, and thereafter, in 1901, took over three smelters, one refinery, and other related properties from M. Guggenheim's Sons. After these acquisitions Smelting became the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world supply of refined lead. It operates lead smelters at East Helena, Montana; Selby (San Francisco), California; El Paso, Texas; Leadville, Colorado; Murray, Utah; and East St. Louis, Illinois, which process ores and concentrates from four to five hundred lead mines. Smelting purchases from the mines 80% to 90% of the lead ore which it processes, and most of its ore of United States origin is so purchased. It publishes daily the price at which it buys lead ore and the price at which it sells pig lead on

the same day. Smelting's published prices on common pig lead are the New York market prices and are accepted by pigment producers as a basis for pricing their products.

Paragraph 2-B: On February 6, 1906, at the time it acquired the United properties, National entered into a contract with Smelting by which Smelting was to sell, and National was to buy, (a) all of the latter's requirements of corroding pig lead except so much as National's Collinsville, Illinois, plant supplied not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. Smelting was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company. If National's Collinsville Smelting plant (the St. Louis Smelting & Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to Smelting at 5% less than the latter's prevailing price.

Paragraph 2-C: Except for corroding lead, the price to be paid by National under this contract was to be based on the average of Smelting's lowest daily schedule prices for the month of shipment, for 50 tons or more on 30-day delivery at St. Louis and New York City respectively, provided that if this price was more than 1.075¢ per lb. above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said London average plus the differential of 1.075¢, which differential was based on the prevailing tariff. The price for corroding lead was to be $2.00 per ton in excess of the above-named price. And it was stipulated be-
875 tween National and counsel in support of the complaint that "the cost of its inventories of corroding quality pig lead and of the lead content of white lead in process and in the finished stock is the most important single factor in its determination and fixing of its price for white lead (since pig lead is the principal material used in the manufacture of white lead)".

Paragraph 2-D: Concurrently with the acquisition of United and its properties and with the foregoing contract, Smelting entered into a contract with Hoyt Metal Company, acquired by National as a property of United, whereby Hoyt was to purchase and Smelting to sell for a period

of fifteen years all of the latter's domestic output of antimonial lead. The price provisions were the same as provided in the Smelting-National contract for other than corroding lead. The contract contemplated deliveries of not more than 800 tons per month.

Paragraph 2-E: The National-Smelting contract gave National control of 85% of Smelting's domestic production of pig lead of all kinds excepting the production of the Shelby Company. Smelting secured 85% of National's consumption of common pig lead and all of its requirements of corroding (or desilverized) lead, less so much chemical or other lead of other brands as National might require. The contract limited National's use of pig lead produced by its own subsidiary (The St. Louis Smelting & Refining Company) to 30,000 tons per year, thus limiting the competition with Smelting from this plant. It also resulted in Smelting's refraining from taking any further interest in the lead manufacturing business. The agreement between Smelting and Hoyt took still more of Smelting's output by the amount of all of its production of antimonial lead. These agreements contracted the open market supply of lead in the United States considerably in excess of 32%. The first contract also set a fixed differential between common pig lead and corroding lead.

Paragraph 2-F: National's contract with Smelting expired in 1921, and the companies signed a contract of mutual release, and made further arrangements whereby National purchased pig lead from Smelting on short term contracts at a spot price or at an average monthly price based on Smelting's daily quotations. National's president, Judge Cornish, told Smelting officials that it was not necessary to renew the long-term contract "because one company had more lead to sell than any other in the United States and the other company was the largest consumer of lead in the United States, and there isn't enough lead from which National could supply its demands without buying from Smelting, and Smelting hasn't enough consumers to take all of its production unless National takes some of it", and that "the contract had a tendency to bind them (National) and handicap their ability sometimes to buy at the lowest price".

876 Paragraph 3: Regarding the third charge involving the transactions and relations between National and du Pont, the record shows that on the 3rd day of Febru-

ary, 1938, du Pont renewed a contract with National which had obtained since 1924 and which was intended to deviate from the old contract by the increase of $25,000 per year of the amounts National was to receive. By the new contract du Pont was to furnish National corroding pig lead, linseed oil, and turpentine, which National was to convert into white lead in oil to the amount of du Pont's total requirements and to package and ship the same to du Pont's order at a stated charge for processing, packaging, and shipping, with certain variations for different size packages. The raw material was furnished by du Pont and the lead in oil belonged to it for sale or use subject to payment of the aforesaid processing and shipping charges. The contract contains no provision for the observance by du Pont of prices charged by National or others for lead in oil, nor is there direct evidence of any express agreement to that effect. However, du Pont based its calculations to determine the changes in the new contract on the card prices, and subsequently requested National to furnish its card prices and changes to its branches in Boston, Flint, Michigan, Chicago, Philadelphia, Toledo, San Francisco, and Wilmington, Delaware. Thereafter du Pont requested a periodical letter from National "covering the price to be in effect for the quarter". Such a letter from National to du Pont, dated September 13, 1940, is shown by Commission's Exhibit 535. A change in discount terms announced by du Pont met the approval of Mr. Rowe of National, who wrote his Chicago branch about it and suggested that "perhaps others in the industry will follow this good example". National represented du Pont in code discussions and the latter was "willing to go along with anything which was agreeable to the others" of the Lead Industries Association, to which du Pont did not belong.

Paragraph 4-A: The uniform zone pricing system substantially as employed by National and Eagle-Picher and followed in salient features by the other respondents involved the sale of lead pigments on a zone delivered price basis with a flat par price for all deliveries in a par zone, which included several states, and increased differentials over the par price for various zones outside of the par zone. Venders prepaid or allowed deductions for all transportation charges and made no allowances or adjustments for differences in delivery costs as between various destinations. The zones and added differentials on the various

products are as shown on Maps 1, 2, 3, and 4 of the Trial Examiner's report upon the facts, which maps and the descriptive matter in Paragraph 4-a of said report are
877 hereby incorporated in these findings. It was shown that shipments of these products were made at the aforesaid prices, terms, and differentials from the following, among other points:

Chicago, Illinois; St. Louis, Missouri; Perth Amboy, N. J.; Philadelphia, Pa.; Oakland, Calif.; Cincinnati, Ohio; Scranton, Pa.; Hammond, Ind.; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; Galena, Kansas.

Paragraph 4-B: On August 8, 1933, the Dry Products Committee of the Lead Pigments Association working on N. R. A. Code proposals discussed and adopted various rules for the equalization of freight, which were based on the practice of adjusting freight charges from various shipping or equalization points established throughout the country, the customer paying freight from these points to his destination. This had been used by National and others for some time, but in the matter of meeting prices the old method rendered it difficult to locate the various equalization points used by competitors. On August 9, 1933, the White Lead-in-Oil Committee met and considered this problem. Thereafter Eagle-Picher wrote Mr. Wormser of zoning proposals, enclosing a map and stating that National was fully informed of the details. The matter was again considered on October 28, 1933, by the Lead-in-Oil Committee as disclosed by the minutes, which stated that no "understanding or agreement" was made. Further correspondence referring to a map and differential points was had between Messrs. Maston and Wormser.

Paragraph 4-C: During the course of committee deliberations as to Code provisions, a method was suggested on the advice of legal counsel for employing certain recommended provisions for the supplementary code prior to their approval by the President, and respondents were advised by the Association Secretary as follows:

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

"I wired you the substance of Mr. Locke's views for no

doubt you will wish to discuss the subject further with other members who now happen to be in Chicago."

This suggestion was passed around in October, 1933, and is apparently reflected in the minute entry of October 28, 1933, which emphasizes the absence of "any under-
878 standing or agreement" in connection with the discussion of freight and zoning problems". Very soon thereafter National announced the zone pricing plan.

Paragraph 4-D: On or about June 9, 1934, National set up the zone system on a nation-wide basis and continued to use it thereafter. Anaconda, through its subsidiary, Anaconda Lead Products Company, was involved in discussions of the plan and employed certain features of it until 1936 when the same methods were employed by it through its subsidiary, International. While respondents Glidden and Sherwin quoted and sold in the different zones on the differentials used by National, they did not conform in all respects to the announced plan. Glidden did not use a map, and it quoted in the par zone f.o.b. various shipping points, although it appears to have used the differentials in quoting and selling outside of the par zone. Sherwin sold f.o.b. various shipping points in the par zone and elsewhere, but applied the announced differentials to carload prices and to delivered prices at specified shipping points in the various zones, and it met zone prices of other respondents at various points in different zones.

Paragraph 5-A1: The Lead Industries Association, to which all of the respondents belonged, was employed by them as heretofore set out in part, in connection with the formulation of a code for the industry as provided by the N. I. R. A. This Association is engaged in a wide range of activities in connection with the entire lead industry. It has a Mining Division, a Smelting and Refining Division, a Metallic Lead Products Division, as well as the Lead Pigments Division, which is involved in this case, and it endeavors to promote improvements in and a wider use of lead in all forms. In connection with the lead pigments code, the Association maintained and operated through three Committees: the White Lead-in-Oil Committee, the Dry Products Committee, and the Lead Oxide Committee. All respondents were represented on these committees as follows: National by F. M. Carter, president, and Harold Rowe, vice president; Eagle-Picher by Mr. Bendelari, president, and its vice presidents Messrs. Roosevelt and

Maston; Glidden by Mr. Paul E. Sprague, vice president; Sherwin by Mr. S. B. Coolidge, Jr., vice president; and Anaconda (Lead Products Co.) by Mr. F. O. Case, sales manager, and Mr. Clarence Glass. Their participation in various meetings is shown by the minutes cited throughout the report. Other representatives also appeared at various meetings. The Secretary of the Association, Mr. F. E. Wormser, acted as Secretary to the Code Authority and of the Committees, received reports, and otherwise functioned as Association representative in these activities.

879 Paragraph 5-A2: After the adoption of a master code dealing with labor practices and other general matters of trade practice, the Committees held meetings to discuss, adopt, and recommend provisions for a supplemental Code to regulate particular methods of packaging, selling, and delivering lead pigments. After numerous meetings and discussions, the Committees formulated and the respondent lead pigments producers agreed to a third draft which was duly recommended, approved, and incorporated in the Code on May 24, 1934. Before the Supplemental Code was put into operation, respondents petitioned for an order of exemption from the terms of Article VII, Section 2 of the Code, a price-filing provision, and Schedule A, rules covering conditions of sale for lead oxides and dry white lead, as hereafter set out. The exemption was granted by the N. R. A. Administrator and thereafter extended, so that these portions of the Code were never effective during the existence of the Code Authority.

Paragraph 5-A3: Concerning agreements on matters not included in recommendations for the Code, such as zone pricing and consignment arrangements, it appears as heretofore shown that respondents did not agree to putting a zone provision in the Code, and the same appears respecting consignment. But these subjects were repeatedly discussed in Committee meetings as shown in the testimony of Mr. Paul Sprague, vice president of Glidden, and elsewhere. The evidence also indicates that respondents were averse to price-filing provisions, that Article VII, Section 2 was reluctantly adopted as a compromise which eliminated the rigid adherence to announced prices and terms which had been proposed, and that the exemptions heretofore mentioned were largely on account of this price-filing provision.

Paragraph 5-A4: It was shown that prices and terms for the sale of lead pigments were never filed with the Associa-

tion by the members at any time. Production figures were reported by the members, but the information showing the production of individual members was not disseminated. It was stated by witness Wormser, Secretary of the Association, that it had never collected or furnished to members any price information, historical or otherwise, and that such statistical information as it did collect and disseminate was furnished others outside of the Association, including interested Government agencies and those engaged in foreign and domestic commerce. These statistics related to the production, distribution, marketing, consumption and uses of lead and lead products.

880 Paragraph 5-B1: The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories. Eagle-Picher also started the plan about this time. These two respondents informed each other of their practices and results in connection with this method, and National informed Eagle-Picher that its agents for the most part were in favor of the continuation of the plan. In November, 1933, National decided to extend the plan on a nation-wide basis and informed Eagle-Picher of that intention. Eagle-Picher extended its operations under the plan at about the same time.

Paragraph 5-B2: This agency or consignment method was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933. The plan was discussed at length by Mr. Carter, president of National, in his letter of September 8, 1933, to Mr. Richter, General Manager of du Pont's Fabrics and Finishes Department, in which he says in part:

"Now, then, we discussed the plan at the meeting of the Pigments Section the other day and found both Sherwin-Williams Co. and Glidden Co. radically opposed because of its consignment features."

In another letter Mr. Carter says of Mr. Richter,

"He has assured me that they would go along and cooperate."

This reference is to Code matters of which Mr. Carter and Mr. Wormser were keeping du Pont informed, and National was representing du Pont in code discussions, although the latter was not a member of the Association.

Agreements to employ a uniform consignment plan were never authorized by the N. R. A. Code.

Paragraph 5-B3: The consignment contracts, as employed by National and Eagle-Picher, appointed distributors as "agents", in National's contracts, and as "consignees" in Eagle-Picher's contracts, which also refer to the relation as an "agency". The provisions of these contracts were the same in all essential particulars. Under their terms stocks were consigned to a dealer for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks, and monthly settlement for the goods sold during the month was made with the consignor for the total amount so sold less the difference between the prices set for the consignee and the resale prices charged dealers and consumers. This difference (between consignee's cost and his resale price) is termed his compensation. Expenses of storing, shipping, selling, and handling the goods must be met by the consignee who must also pay all taxes. The contracts strictly limit the consignees' authority to the custody and sale of such goods as may be consigned to them. Consignees may not bind consignors respecting any other than consigned goods, or in any other particulars. National's contracts run between "manufacturer" and "agent". Some of Eagle-Picher's forms refer to "seller" and "distributor", while others name "manufacturer" and distributor". Consignments were subject to withdrawal at any time, and consignees were required to report stocks on hand. Mr. Carter spoke of "selling" those who could qualify and subscribe to the requirements of the contract.

881

Paragraph 5-B4: The stated purpose of the consignment plan was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stored in distributors' warehouses and was otherwise objectionable. But in writing to du Pont about the plan, Mr. Carter, president of National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district * * * while selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system."

Mr. Rowe of National, in a circular to branch managers, November 9, 1933, said in part:

"It should be kept in mind that the purpose of the whole agency plan is to control the dealer's selling price of white lead, so that he may be assured of a reasonable profit." The agency plan was effective in preventing sales below costs and other price-cutting.

Paragraph 5-B5: National employed the consignment plan from early in 1933 to January, 1944, when government restrictions caused it to terminate the agreements. Thereafter National made "fair trade agreements" under the Tydings Amendment with respect to its "Dutch Boy" brand of white lead-in-oil. Eagle-Picher began consignments when National did and conformed to National's methods in every essential particular until about March
882 9, 1942, when it modified the contracts to meet war conditions and reduce stocks. It required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force.

Anaconda, through its subsidiary Anaconda Lead Products Company, and later through its subsidiary International Smelting & Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigment business. During this time it sold some lead-in-oil on a modified consignment plan. No particular contract form appears to have been used by Anaconda except for dry white lead consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee. This was not shown to be similar to National and Eagle-Picher contracts. Anaconda consigned lead-in-oil in other territory on a plan of its own without written contracts, and without agreement that the consignee sell only at the resale prices suggested by the consignor.

Glidden, which had opposed the consignment plan, did not consign stocks until six years after the plan was inaugurated. On the urgence of its salesmen and managers that a consignment arrangement such as that of other lead corroders would double its business, it furnished forms and instructions for consignment selling on July 17, 1939. Glidden's contract and its instructions to salesmen indicate a departure from that of National and Eagle-Picher, in that it offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry con-

signed stocks of competitors, and they often consigned stocks to more than one dealer in the same territory. Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Mr. Sprague, Glidden's vice president, testified that they had "bucked this plan for four or five years". Glidden's price under this plan was "the same as that of other corroders".

Sherwin-Williams never sold on the consignment plan at any time.

Paragraph 5-B6: Respondents' price cards issued periodically to dealers carried complete lists of prices at which it was suggested that they should sell white lead-in-oil or other keg products to consumers and painters. The title terms "dealers' schedule", "resale prices", "painters' price list"; and "dealers' recommended selling schedule" are used on these cards, and the prices so set out by all respondents at comparable times were identical except for occasional slight variations by Glidden or Anaconda.

883 Paragraph 5-C1: Regarding the collective fixing, quoting, and employing uniform prices, terms, and conditions of sale, it was shown that respondents, through the Association and Code Committee meetings, discussed, agreed on, and recommended provisions for the collective employment of the following methods:

Pricing lead oxides, or mixtures, in 20-ton lots or more on Smelting's price, or published price, for common pig lead, and selling smaller quantities on "seller's card or quoted price in effect on date order is received", with the reduction of ½¢ per lb. under the card price for 5-ton lots to one delivery;

Selling red lead (lead oxide) containing 97% Pb_3O_4 at ½¢ lb. and that containing 98% at ½¢ lb. over seller's price for lower grades;

Selling basic lead carbonate (dry white lead) at seller's card price or quoted price in effect on date of order, with a reduction of ½¢ per lb. on 20-ton lots to one buyer and one destination;

Delivering carlots of oxides or basic lead carbonate f.o.b. car, seller's shipping point, or by truck on 3-day deliveries f.o.b. buyer's premises;

Selling on terms of net 30 days on car shipments of oxides and 1% 10 days, 30 days net, on L. C. L. shipments of oxides and on all shipments of basic lead carbonate;

Discontinuing guarantees against price declines except for undelivered portions of contract purchases.

Paragraph 5-C2: References to particular prices, as distinguished from price differentials, do not appear in Schedule A, and such was purposely avoided. Many of the terms and conditions included had been employed previously by various respondents, and National put Article II of the supplementary code into operation some months prior to its formal adoption. The differentials over Smelting's price on pig lead of $1.50 per cwt. for litharge and $2.50 for red lead had been employed for some time prior to 1933, and respondents used them uniformly thereafter. Prices of oxides in smaller quantities were based on the aforesaid carload prices as determined by these differentials. The stated differentials between 20 tons and less on lead carbonates and between 5 tons and less on lead oxides appear on the price cards of all respondents quoting on these products after 1933.

884 The lead price basis and the fixed differentials eliminated variable factors in the price structure. All of the Schedule A methods were consistently observed and practiced by all respondents during and after the Code period with the exception of the stated terms and f.o.b. car deliveries at seller's plant. The dealers' price cards indicate that the terms used varied from 1% ten days net 30 days to 2% ten days net 60 days, but at any period the terms of all respondents on similar products and quantities were uniform, and the deliveries were for the most part to buyer's location to seller's plant with freight allowed, or f.o.b. stated shipping or equalization points.

Paragraph 5-C3: As to the contention by respondents that the similarity between their prices, terms, and differentials was the natural result of National's leadership and is not indicative of agreement, Glidden's vice president, Mr. Sprague, testified that National's price made a ceiling for them and that they had to operate in the narrow range between this ceiling and the price of lead. Mr. McCarthy, General Sales Manager of National, testified that National made prices for basic white lead without regard to competition, but is competitive with other pigments; that such prices were made by the general office after the consideration of such factors as the cost of pig lead, containers, labor, freight, research, and advertising as well as current prices of competing pigments such as leaded zinc, zinc ox-

ide, titanium, and others. In prices for lead-in-oil, the cost of linseed oil and the price structure for prepared paints would also be considered. Other respondents adduced testimony that they obtained National's and Eagle-Picher's prices, terms, and quotations from customers and from trade publications, and that they thereafter met this competition because failure to meet lower prices and terms resulted in loss of orders, while meeting National's price raises, so far as they could, broadened their restricted profit margins and was necessary to their business.

Paragraph 5-C4: Deviations from National's prices were shown and explained. Eagle-Picher sold its Hammer brand at ½¢ per lb. less than National's white lead-in-oil. Glidden sold lead-in-oil to dealers at ½¢ per lb. under National's card prices for "Dutch Boy" because of the wide demand National had created through its prestige, advertising, and greater ability to supply the trade. Glidden sometimes made concessions to encourage greater sales effort on the part of dealers, and sometimes it charged dealers 5¢ more per 100 lbs. than National and others charged. Anaconda sold lead-in-oil at ½¢ per lb. below National's "Dutch Boy" brand because its management believed the latter's prestige in the trade was such that
885 Anaconda's brand could not compete at the same price.

In sales of lead oxides to large battery manufacturers, National and Eagle-Picher made substantial price variations from each other which involved reductions from prevailing price cards and from prices charged other customers during the same months.

Paragraph 5-C5: Subsequent to these agreements as to what should be recommended for the Code, respondents issued periodical cards containing quotations of prices and terms for sales to dealers and others. Following is a table of par zone prices showing parallel quotations on white lead-in-oil and other keg products per 100 lbs. in 100-lb. or larger containers for the dates shown, which dates correspond to those of the recommended resale price cards heretofore mentioned, to-wit: [Include here the tabulation based on the price cards which is set out in Paragraph 5-c5 of the Report Upon The Evidence].

National's and Eagle-Picher's quotations include cost of delivery. Anaconda quotes f.o.b. East Chicago, freight allowed. Glidden quotes f.o.b. the following shipping points: Baltimore, Md.; Boston, Mass.; Buffalo, N. Y.; Chicago,

Ill.; Cleveland, Ohio; Scranton, Pa.; Evansville, Ind.; Long Island City, N. Y.; Reading, Pa.; St. Louis, Mo.; Toledo, Ohio; and Detroit, Mich.

Sherwin quoted f.o.b. the following shipping points: Altoona, Ashtabula, Binghampton, Buffalo, Canton, Charleston, Cleveland, Columbus, Detroit, Huntington, Johnson City, Mansfield, Pittsburgh, Rochester, Uniontown, Warren, Wheeling, and Youngstown.

Prices to consignment accounts were $1.00 to $1.25 lower than the dealer prices set out above.

Paragraph 5-C6: Regarding uniformity of prices in actual sales, the tabulations set out below show comparative prices charged on invoices covering sales during quarterly periods selected as representative of general practices as revealed by examinations of a great many retained copies of invoices produced from respondents' files. The invoices tabulated cover less than carload shipments from respondents' various production and shipping points to 16 cities in the par zone, including Boston, Milwaukee, St. Louis, and Wheeling, West Virginia: [Included here the two tabulations set out in Paragraph 5-c6 of the Report Upon The Evidence].

886 Paragraph 5-C7: The foregoing record of 1,230 sales covering two quarterly periods reveal a complete uniformity in price between National and Eagle-Picher, a substantial variation between these and the substantially uniform lower prices charged by Anaconda, Glidden, and Sherwin for the same periods. The deviations by Glidden and Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points.

Paragraph 5-C8: Invoices covering 304 sales of white lead-in-oil for January through March, 1941, by National and Eagle-Picher to zones 2, 3, 4, 5, 6, and 7 to agents and distributors reveal a strict observance of all zone differentials by both and identical prices in all but three sales over card and three under card by National. The same exhibits reveal 34 lead-in-oil sales to dealers in zones 2 to 6 by Glidden, Anaconda, and Sherwin, which reveal their strict observance of all zone differentials, price uniformity between them in all premium zones into which two or more shipped, and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices.

Paragraph 5-C9: Sales of dry white lead in car and less than car lots to manufacturers in the par and 25¢ zones are shown by 448 invoices covering the first quarter of 1941. These conform to the zone differentials and follow, with a few exceptions, a price pattern which involves quantity differentials between car lots and less sold to manufacturer customers.

Paragraph 5-C10: Sales of red lead and litharge (oxides) as evidenced by invoices of National, Eagle-Picher, and Glidden for the last quarter of 1941 follow the formula of $1.50 for litharge and $2.50 for red lead over Smelting's pig lead quotations and the quality differentials on red lead. With occasional exceptions covered by contract sales and sales to battery manufacturers, the prices of the three were uniform. The quantity differentials which each applied were 90¢ per cwt. over car prices for less than 5 tons, and 40¢ over car for 5-ton lots.

Paragraph 5-C11: Means of eliminating excessively low bids on government and state purchases were discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business was considered and the group was asked to give the matter further thought. On Sherwin's trade bulletins to its managers and salesmen, instructions are given for following large dealers' prices on Government, State, and municipal bids. Identical bids were repeatedly submitted on 887 basic carbonate white lead from 1938 to 1941 to the City of Cincinnati by National, Eagle-Picher, and Sherwin. These bids were identical to the fourth and final decimal. Identical bids on white lead-in-oil were submitted to the Milwaukee Board of Purchases as follows: In 1939 by National and Sherwin, both bidding $8.33 per hundred; in 1940 by Eagle-Picher, National, and Sherwin, all bidding $8.57; in 1942 by Eagle-Picher and Sherwin, both bidding $9.80 while National bid $10.05; in 1943 by Eagle-Picher, Sherwin, and National, all bidding $9.80. However, bids by respondents to federal agencies, involving bids to the Treasury Department, the Navy, and the Panama Canal Zone, during 1939, 1940, and 1941, contain twelve cases of unequal bids by respondents and nine cases of identical prices by two or more of them, all respondents, including Glidden, being involved.

Paragraph 5-D: Container price differentials were discussed in detail at the meeting of the Lead Pigments Divi-

sion, Dry Products Committee, on August 8, 1933, and the following provision was tentatively adopted but was not thereafter approved for the Code, to-wit:

"On government bids and on railroad (and industrial) business the following package differentials over L.C.L. barrel prices are hereby established: 100 lb. kegs $.50, 50 lb. kegs $.75, 25 lb. kegs $1.00."

Thereafter all respondents, as shown on the numerous price cards heretofore cited, quoted and charged a differential of 25¢ as between the various container sizes used to contain 100 lbs. of pigment. That is, 100 lbs. in two 50-lb. kegs or cans was sold at 25¢ more than the price for the same quantity in one container. For four 25-lb. containers, 50¢ was added, and for eight 12½-lb. containers, 75¢ was added. All respondents admit employing this practice, and it was shown by both Sherwin and National that the differentials charged are less than the cost involved as between single containers requiring only one process of sealing, packing, labeling, and handling, and the costs of the additional containers, each of which is similarly processed.

Paragraph 5-E: Respecting the making of quarterly contracts by respondents for the sale of lead pigments at a fixed differential over Smelting's New York price for common pig lead, there was an N. R. A. Code provision for contract sales with specific provisions for the basing of prices on the seller's card price on the first day of each quarter, and there was also a provision for basing carload prices on Smelting's market prices on the date orders were received. The matter of uniform sales contracts and 888 conditions therefor was discussed in committee prior to the adoption of the Code, and some of the provisions were incorporated in the second draft. But these were not adopted, and it was not shown that a uniform contract was ever agreed on.

Paragraph 5-F: All respondents except Anaconda, which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed on for Schedule A. For 97% Pb_3O_4 a charge of ½¢ per lb. over lower grades was added. For 98% the charge was ½¢ over the 97% grade. The higher grades of red lead are made by extra burning and involve a difference in cost of manufacture, as shown hereafter.

Paragraph 6-A: Regarding effects of the practices

shown above, National's acquisitions and its close co-operation with Eagle-Picher gave the two more than 68% of the white lead, dry and in oil, business and more than 50% of the oxide business in the United States. It also appears that the consumption of pig lead by these two was approximately 50% of the total produced and sold for the manufacture of lead pigments in the United States, and that the price of lead pigments announced and maintained by National and Eagle-Picher had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get. The effect of National's contracts with Smelting was to confine the price on a major part of the United States consumption of pig lead to an average monthly price and thus prevent the basing of prices on daily market fluctuations and to restrict opportunities of buying pig lead at lower prices.

Paragraph 6-B: The effect of zone pricing within a zone was to equalize prices between all customers within the zone regardless of proximity to the shipping point. Delivery costs from a single shipping point varied on white lead-in-oil in the par zone from a few cents per cwt. to 56¢ per cwt., and the average freight for the zone on the shipments from one location was shown to be approximately 20¢ per cwt., on products which averaged about $9.00 in price per cwt., making the delivery cost involved in each customer's delivered price 2.2 per cent of that price. But an f.o.b. mill price would give the processor at the shipping point an advantage equal to the actual cost of transportation to his competitor's location. Costs for truck deliveries or car switching were often involved in local sales.

889 For extra price zones, the average freight on keg products was shown to be 49½¢ per cwt. in the plus 12½¢ zone, and 80.8¢ per cwt. in the plus 37½¢ zone. On dry white lead the approximate freight overages were 35¢ in the par zone and 76¢ in the 25¢ zone. These differences were less than the average freight differences for a particular zone, but for shipments to near points to zone borders and shipments from points within a premium zone to customers in premium territory, the price differential was more than the freight difference in a substantial number of cases.

Paragraph 6-C: The effect of the zone price on competition between customers of respondents was to enable distant processors to compete millwise on an equal cost basis with the near-mill customer, which they could not do if the latter had an f.o.b. mill price. That is, the near-mill processor receiving mill-net or base prices has an exclusive competitive advantage which extends in diminishing degrees all the way to the location of the distant processor who pays mill net plus freight. The near processor is on an equal cost footing at the distant competitor's location and at all points beyond. The latter would have no advantage zone except as against a more distant competitor, and this he must share with the near-mill competitor. Distant processors prefer the zone price to one which enables them to make freight savings and not be on an equal basis with competitors nearer the supply.

Paragraph 6-D: Zone pricing simplifies the process of quoting and selling and enables salesmen and customers to avoid complicated freight calculations in comparing prices. In this way the system had the effect of facilitating price matching and producing price uniformity. And it did produce on the part of all respondents a complete uniformity of price differentials and uniform prices on dry white lead and oxides.

Conclusions and Reasons.

Paragraph 7-A1: The evidence heretofore set out shows that National acquired a predominating position in the lead pigments industry and added to its dominant power by establishing close co-operation with Eagle-Picher. National acquired by contract control of 85% of Smelting's output of pig lead and restricted its own production of pig lead. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores. On the other hand, the 890 arrangement through a substantial contraction of supply, tended to prevent lower prices for pig lead. The effects on prices of pig lead were trade-restraining and monopolistic. The purpose and effect of National's acquisitions, as shown by the circumstances of their execution

and the conduct of the business thereafter, was to control the lead industry and to regulate prices of pig lead and lead pigments.

Paragraph 7-A2: National's relations with du Pont were such as to evidence a tacit understanding that the latter would not deviate from National's prices in the sale of white lead-in-oil, and the two co-operated to maintain price uniformity in the sale of this product which National processed under contract.

Paragraph 7-A3: Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale. Respondent Anaconda, through its subsidiaries, employed the zone pricing methods established by National and Eagle-Picher so as to produce (1) substantial price uniformity with all respondents in the sale of dry white lead, and (2) uniform variations in its prices for lead-in-oil and other keg products from prices set by National and Eagle-Picher and substantially uniform prices with Glidden and Sherwin on these products. Respondents Glidden and Sherwin departed from the zoning method by quoting f.o.b. various shipping and equalization points to many customers, but they observed the zone prices in carload shipments, in establishing shipping point prices, and in selling at competitive points. They thus maintained (1) uniform prices with all respondents on oxides and dry white lead, and with Anaconda in the sale of lead-in-oil and other keg products, and (2) uniform variations from National's and Eagle-Picher's prices on said keg products.

Paragraph 7-A4: All respondents belonged to and employed the Lead Industries Association as a medium for conferences and agreements respecting methods of selling lead pigments, some of which were agreed on and recommended for the N. R. A. Code, and a number of which were unlawfully employed by respondents as herein appears.

Paragraph 7-A5: The "Agency Plan" was employed by National and Eagle-Picher. Some features of it were followed for a short time six years later by Glidden, which had opposed its adoption for the Code. Anaconda followed a modified plan which did not require its consignees to resell at a fixed price. Sherwin did not use the plan in any way.

891 Paragraph 7-A6: All respondents discussed and the Lead Pigments committees recommended for the Code the following pricing methods: (1) basing lead oxide prices on Smelting's price for common pig lead, (2) allowing ½¢ per lb. under card prices on 5-ton lots of lead oxides, (3) allowing ¼¢ per lb. on 20-ton lots of basic lead carbonate, (4) charging ½¢ and ½¢ per lb. respectively over lower grades on 97% and 98% red lead, and they discussed, without recommending for the Code, differentials between containers of 100, 50, 25, and 12½ lbs. Thereafter all respondents applied differentials 2, 3, and 4 as stated above in their quotations and in their sales without a substantial number of deviations. And all respondents, except Anaconda which sold no oxides, based carload prices for lead oxides on the New York price for common pig lead, which prices were Smelting's prices.

Paragraph 7-A7: All respondents discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies, and thereafter submitted identical bids in a substantial number of cases; and

Paragraph 7-A8: Respondents issued periodical price card quotations containing lists of identical resale prices at which dealers were expected to sell lead pigments to consumers and painters.

Paragraph 7-B1: From evidence of the various conferences, practices, and results as heretofore set out, it appears that there was agreement between National and Eagle-Picher as to the zoning plan and the agency plan. They quoted and sold white lead-in-oil and other products at identical prices, except to a negligible degree. They employed the same quantity, quality, container, and class differentials. They used the same differentials over pig lead as a basis for prices on lead oxides. They suggested to dealers identical resale prices to consumers and painters, and sold on the same terms and conditions. These similarities of action were subsequent to discussions between themselves and others as to these methods. One of these features, the "Agency Plan", was shown by conclusive evidence to have the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits to dealers. The zone pricing feature was shown to be a method which facilitated the meeting, or matching, of competitors' prices. The quantity, quality, class, and container differentials were agreed price variations which tended to prevent differences in price as be-

tween sellers. The adopted method of basing oxide prices on Smelting's prices—furnished a common denominator for maintaining uniform prices on lead oxides. And 892 the continuous uniformity of prices, terms, and conditions of sale in white lead and other keg products not only illustrates the effectiveness of the methods, but also reveals the purpose underlying their employment. These discussions, practices, and results show conclusively that respondents National and Eagle-Picher agreed, co-operated, and pursued the common purpose of fixing and maintaining uniform or identical prices, terms, and conditions of sale, and that the same eliminated price competition between themselves to a substantial degree.

Paragraph 7-B2: Respondent Anaconda was not shown by direct evidence to have agreed to any pricing methods beyond the showing that its representatives were present at the committee discussions and the adoption of the Schedule A provisions. It failed to employ the agency device in such manner as to enforce resale price conformity, and it failed to employ the zone prices and differentials so as to produce matched prices with National and Eagle-Picher in the sale of white lead-in-oil and other keg products, but on these items its prices, though substantially lower than those of National and Eagle-Picher brands, were very close to the prices of Glidden and Sherwin on similar commodities. Anaconda's zone, quantity, quality, and container differentials were the same as those of all other respondents. It also announced suggested resale prices to dealers which were identical with all other respondents. Agreement to employ these methods and to conform to National's prices within certain limits and to Glidden's and Sherwin's prices with a minimum of deviation appears clearly from these circumstances. In these particulars Anaconda went much beyond the bounds of normal competitive behavior, and it must be inferred that it entered into the general agreement and co-operated in effecting price uniformity.

Paragraph 7-B3: Respondent Glidden did not conform in all respects to National's and Eagle-Picher's zone-pricing methods, since it used shipping points from which customers paid the freight, and it made prices substantially different from these, It did not use any consignment plan until six years after its adoption, and this use was short-lived and not according to pattern. Glidden employed the various zone and other differentials, issued re-

sale price suggestions identical with those of all other respondents, and based its lead oxide prices on Smelting's price for pig lead. It gave active competition within a limited price range, but it went beyond the requirements even of a limited competition by adhering to the exact zone and other differentials used by its competitors and in the simultaneous utterance of identical resale price suggestions. Its acceptance, assent, and employment of these 893 methods and its co-operation in upholding the price structure of the other respondents and in maintaining price uniformity is apparent from the circumstances.

Paragraph 7-B4: Respondent Sherwin conformed in part to the zone pricing plan as heretofore shown. It did not use the consignment plan for controlling resale prices, but it issued simultaneously with other respondents identical resale prices for the use of dealers. It also observed all of the quantity, quality, and container differentials and sold oxides on prices based on Smelting's price for pig lead. Sherwin's prices for white lead-in-oil were substantially under National's prices on its "Dutch Boy" brand, but they were approximately the same as those of Anaconda and Glidden for similar brands. On other products, such as dry white lead, Sherwin's prices were in line with National's. The entire price range was set by National, and other respondents were obliged to conform within certain limits, but in the exact observance of differentials and in the simultaneous and identical price suggestions to dealers, Sherwin went beyond the requirements of competition to such an extent that agreement to co-operate in maintaining the price structure and lessening price competition is the more weighty inference.

Paragraph 7-C1: National's acquisition of the major portion of the lead pigment processing industry, its control by contract of the major portion of the domestic production of pig lead, and its agreement and co-operation with Eagle-Picher in maintaining identical prices and terms between them and in circumscribing the price competition of their smaller competitors and inducing a measure of conformity on the part of the latter to their prices, differentials, terms, and conditions of trade, had the tendency and effect of restraining trade, suppressing price competition, and creating monopolistic conditions.

Paragraph 7-C2: The particular tendencies and effects of the zone pricing system as practiced by respondents were to enable all producers to match the prices of com-

petitors and to produce identical prices in all zones to all buyers in a given trade class, or to vary therefrom according to consistent patterns. This had the tendency and effect of suppressing price competition and restraining trade as between them. The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost so that they had an equal competitive advantage. As between near-mill purchasers in the same zone and others, the flat zone price enlarges the areas of
894 equal competitive opportunity and tends to distribute the locations of processing enterprises. But it was shown that the differentials between zones were often unfair as trade restraining, since the price differences were more than differences in transportation or other costs.

Paragraph 7-C3: The zoning system operated to prevent near-mill customers from having any special advantage over their competitors located at a distance. This cost the near-mill customer in the par zone 2.2% over an f.o.b., mill price, less local delivery costs, and failed to extend his exclusive advantage from half-way to all the way to his far competitor's door. The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories.

Paragraph 7-C4: The effects shown throughout the record of the combined results of zone pricing, consignment selling, uniform differentials, uniform terms and conditions of sale, were to produce identical prices, terms, and conditions of sale between National and Eagle-Picher and produce substantial uniformity of price differentials, terms and conditions by Anaconda, Glidden, and Sherwin, and prices by these three which varied according to pattern and according to differences of brand and quality. The various differentials and the oxide price formula operated to establish an inflexible price structure which eliminated variations in price based on quantity, quality, cost of delivery, container costs, or other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale. The price structure maintained by respondents is such that all delivered prices on the various grades, quantities, and qualities advance or recede with the change of a base price factor. This facilitates price-matching, and has the tendency and effect of

suppressing, restricting, and restraining price competition as between the sellers.

Paragraph 7-C5: The practice of respondents in simultaneously announcing suggested resale prices at which dealers are expected to sell had the effect of discouraging and lessening price competition between their customers who could not fail to be influenced by the knowledge that all of their limited sources of supply are interested in their maintaining price uniformity between themselves.

Conclusions of Law:

Paragraph 7-D1: None of the practices herein found to have been employed by the respondents come under the exemptions of the National Industrial Recovery Act 895 for the reason that the provisions of the Code covering some of the practices were suspended by an exemption under Section 3(a) of the Act which was issued on application of respondents. This act was extended at their request, so that these Code provisions were never effective during the existence of the Code Authority. The exemptions, under Section 5 of the Act, which applies to "any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period * * *", do not apply to any agreements or methods not protected by a Code provision which was in effect at the time they were entered into and employed prior to the termination of the exemption period. Other of the practices were never adopted and incorporated in the Code or supplemental code, and were not protected by this Act either during or after the Code period. Practices covered by the provisions which were adopted and suspended, as well as the other practices, were also employed before and more than sixty days after the termination of the Code and the expiration of the exemption period provided in Section 5.

Paragraph 7-D2: The acts and practices set forth in Paragraphs 7-B1 through 7-B4 constitute conspiracy by all respondents to fix and maintain uniform prices, differentials, terms, and conditions of sale in the lead pigment industry, which conspiracy was carried out by all respondents through the various methods heretofore shown. While some of the respondents were not shown to have employed all of the particular methods alleged and considered, and

while there were some variations in practice and results as between respondents, the greater weight of the reliable, probative and substantial evidence renders it clear that each respondent went beyond the requirements of competition, and beyond the requirements imposed by National's price leadership, in the matter of identical bidding and in practice of the various methods which they had discussed together, and in the institution and maintenance of a uniformity of prices, terms, and conditions of sale, and that these acts and practices were the results of agreement and conspiracy.

Paragraph 7-D3: The acts and practices of respondent National in acquiring competing units of the lead industry, and in resorting to monopolistic practices by unduly influencing the price of pig lead, in monopolizing the major portion of the domestic supply of pig lead, and in monopolizing the major portion of the production and sale of oxides and lead pigments so as to enable it to control prices, terms, and conditions of trade and restrict price competition, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

896 Paragraph 7-D4: The acts and practices of all respondents in agreeing and co-operating to influence uniform resale prices on the part of dealers by the simultaneous utterance of identical resale price suggestions constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 7-D5: The acts and practices of all respondents in agreeing and co-operating to effect uniformity of prices, terms, and conditions in the sale of lead pigments by adopting and employing uniform zone prices and identical zone, quantity, quality, and container differentials and by uniformly basing prices of lead oxides on the prices of American Smelting & Refining Company for common pig lead, constitute conspiracy to restrict price competition between themselves and to employ the said methods to that end, and these acts and practices had the tendency and effect of restraining trade to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 7-D6: The acts and practices of respondents National and Eagle-Picher in agreeing and co-operating to produce and in producing identical prices in the sale of

lead pigments by their dealer customers, through the use of uniform consignment agreements with said dealers, constitute conspiracy to restrain trade, are to the prejudice of the public and the lead industry, and are in violation of the Federal Trade Commission Act.

Paragraph 8-A: The charge in Count Two, numbered 8 in the outline, is that the zone pricing discriminates in price (a) between customers located in the same zone, and (b) between customers located in different zones, the customers being in competition with each other, and the price differences not being justified by differences in cost.

The second charge (No. 9) alleges discriminations arising out of differences in price effected through different trade, regional, and quantity discounts.

The facts relating to the parties, zone pricing, price differences, differentials, and other features bearing on the issues under this count which are set out in the Report Upon The Evidence under Count One, are adopted and applied to the issues under this count except that the facts of interstate commerce heretofore set out are adopted and applied to "commerce" as the term is defined in the Clayton Act. Other facts and their bases will be considered as cited.

897 Paragraph 8-A1: The facts heretofore set out show that the flat price in a given zone is a delivered price which is paid by the customer for two economic values or "goods", (1) the commodity produced at the mill, and (2) transportation. As between customers at different locations the cost of transportation varies, while the cost of the commodity at the mill is the same. But the net mill price of the commodity varies inversely with the freight cost so that the two combined are equal to the fixed delivered price. That is, $P = F + N$, wherein P is the delivered price, F is the actual freight or delivery cost, and N is the net amount received by the mill for the commodity. The net price (N) is made to vary irrespective of its uniform cost, and the price of F is made the same irrespective of differing costs. There is no base price to which varying amounts of freight are added, but the delivered price is based on raw material, production, and selling costs plus an average freight factor which give the near as well as the distant customer the same total price. Where the average freight increment of the price to near-mill customers is more than the actual cost of delivery, the seller receives a profit on the freight which

increases his mill net; but where the distant customer receives more freight value than the average freight factor in his price mill net is shrunk by the amount the freight paid exceeds this factor. The delivered price in a premium zone may be expressed as P= N + (F + X), in which F is the average par zone freight factor and X is the zone differential. The first equation is the analytical expression of a uniform delivered price as between customers, and the equation last given is that of a differing delivered price.

Paragraph 8-A2: Shipments made by respondents between various points during the period from January to March, 1941, show the following maximum variations in price and price factors applying to white lead-in-oil per 100 lbs., P being the zone delivered price, N the mill net or realized price for the product, and F the actual freight cost, to wit: [Include here tabulation based on invoices as set out in Paragraph 8-a2 of the Report Upon The Evidence.]

Paragraph 8-A3: As shown above, discriminations based on differences in mill net may be in favor of the purchasers in the distant zone, who receive much more in transportation value. The advantage to El Paso, as shown above, was less by $1.00 because of the differential. But in border territory, as between St. Louis, Missouri, and near points where the freight is negligible, the different prices resulting from the additions of ½¢ or ¼¢ per lb. involved a discrimination against customers so located by the added amounts, and would lessen their ability to
898 sell and ship back towards St. Louis. These results follow selling into a premium zone from a lower pricing zone, or from the same premium zone, and were not shown to have been based on differences of delivery or other costs, although the differing prices were uniformly quoted and charged. National sold oxides from its plants in Dallas, Texas, and Atlanta, Georgia, to nearby battery manufacturers and others in the same zones at the zone premium of ½¢ per lb. Some deliveries were by truck in the same city as the plant, and others were at negligible distances freightwise.

Paragraph 8-A4: Eagle-Picher shipped oxides and other pigments from its borderline plant in Joplin, Missouri, to near and far points in different zones. For keg products this plant is in the 12½¢ zone, and is about 15 miles from the 25¢ and 50¢ zones. The 37½¢ zone is about

40 miles distant. For oxides the plant is in the par zone and about 10 miles from the borderline of Oklahoma, which is in the 25¢ zone (See maps). Except at Texarkana, Texas, a border city near Texarkana, Arkansas, Eagle-Picher sells from this plant at the zone prices. It sells to battery manufacturers large and small, and employs quantity differentials. The following prices and freight factors per cwt. were shown for shipments of red lead to battery manufacturers from the Joplin plant:

Destination	Zone Price Differential	Freight
Nashville, Tenn.	0 (Par)	53½¢ CL
Birmingham, Ala.	25¢	62½¢ CL
Omaha, Neb.	0	19½¢ CL
Minneapolis, Minn.	0	38¢ CL
New Orleans, La.	25¢	45¢ CL
Council Bluffs, Ia.	0	76¢ L 5-ton
O'Keene, Okla.	25¢	73¢ "
Tulsa, Okla.	25¢	44¢ "
Stott City, Mo.	0	25¢ "

Prices and rates are those prevailing from October 1 to December 31, 1941, as shown by Commission's Exhibits 659 through 663 and elsewhere. Commission's Exhibit 844 shows other shipments reflecting similar relations between differing prices and freight. As between these zones, freight differences do not appear to bear any relation to price differences.

Paragraph 9-A: Respondents National, Eagle-Picher, and Anaconda charged consignment dealers in the par zone $1.00 less per cwt. on white lead-in-oil than its price to competing dealers in the same locations. It was shown that profits on this item were close and that the differential was of substantial competitive value. No justification was shown. In fact, consignment selling appears to be more trouble and expense than selling to dealers who buy and own their own stocks.

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Paragraph 9-B: All respondents were shown to have maintained differentials of 25¢ between 100-lb., 50-lb., 25-lb., and 12½-lb. containers of 100 lbs. of keg products. These differentials were shown to be no more than differences in the cost of containers, packaging, and handling, and were not shown to have lessened competition in any line of commerce. No effects other than those charged in Count One were shown.

Paragraph 9-C: Quality differentials on red lead, Pb_3O_4, of ¼¢ per lb. for 97% over lower grades, and ½¢ over for 98%, were shown by many quotations and invoices to have been quoted and charged by all respondents except Anaconda. These higher grades of red lead were shown to have required extra processing and thus to involve extra costs which were as much or more than the differentials charged. No lessening of competition or tendency thereto through these differences was shown.

Paragraph 9-D: All respondents quoted and charged different prices as between carloads and smaller quantities of oxides. The car price was based on Smelting's price for common pig lead and the car price for smaller quantities involved a difference of 90¢ per cwt. under the car price except that ½¢ per lb., or 50¢ per cwt. under the card price, was allowed for 5-ton lots. The differentials over car prices were, therefore, 40¢ per cwt. for 5 tons and 90¢ per cwt. for smaller quantities.

These price differences in a substantial number of cases were much more than the differences between car and less than car freight rates, and resulted in excess of charge over delivery cost as high as 88¢ per cwt. against the purchaser of small quantities.

The following prices and rates per cwt. show representative results and include shipments by respondents National, Eagle-Picher and Glidden: [Here include tabulation from Paragraph 9-d of the Report Upon The Evidence].

The foregoing shipments were of red lead. Rates and differentials on litharge were the same, and the prices $1.00 less in all billings. The freight rates on 5-ton and smaller lots were the same. Consequently the lack of justification on shipments under 5 tons can be determined by adding 50¢ to the 5-ton discrimination. This reveals a price difference of 50¢ or more over freight differences at all points and no case where the differential be-
900 tween 5-ton and smaller shipments is justified. Respondents' own estimates shown for dry white lead indicate an increased cost of about ¼¢ per lb. against less than car lots, but this figure applied to oxides would fall far short of justifying the 90¢ differential in any case, or the 40¢ charge in most cases. An additional discrimination of 25¢ per cwt. against less than car shipments of oxides was made in shipments to customers in Montana, Wyoming, Colorado, and New Mexico, since these states are in

the 50¢ zone for small shipments and in the 25¢ zone for car lots (See maps 3 and 4).

Paragraph 9-E: All respondents sold basic lead carbonate (dry white lead) at ½¢ per lb. under card prices on carload shipments (20 tons or more). This difference is in the majority of cases less than the difference between car and less-than-car freight rates.

Shipments involving points selected at random and considered on the basis of the freight rates contained in Commission's Exhibits 742 and 751-B show the following relations between the 25¢ quantity differential and the difference in freight: [Here include tabulation and material below it in Paragraph 9-e of the Report Upon The Evidence].

Paragraph 9-F: All respondents employed a price differential of ½¢ per lb. between 500 lbs. and less on white lead-in-oil and other keg products. This bore no relation to freight differences, as both quantities bore the same L.C.L. rate. No other cost differences between these quantities were shown.

Paragraph 10-A: The effects of zone differentials in border territory and of added amounts for shipments originating and terminating in the same premium zone were shown to increase the cost of oxides from ½¢ to ½¢ per lb. over prices charged other customers, which differences were not based on differences in transportation or other costs. To these effects was added, as against the less-than-5-ton purchaser, small battery manufacturers in the Birmingham territory, a quantity differential of 55¢ per cwt. (90¢ less a freight difference of 35¢). Similar discriminations in varying amounts over ½¢ per lb. are seen from a comparison of items shown in Commission's Exhibits 853-A to I and 854-A to C. The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were 90¢ quantity differential plus a 25¢ difference between car and L.C.L. zoning, less 71¢ freight difference, or 44¢ per cwt., to which may be added ½¢ as compared with a nearby competitor in Kansas or in 901 other locations carrying the same or less freight costs (Map 3). These unjustified differentials amount to ½¢ per lb. or more in a substantial number of cases.

Paragraph 10-B: It was shown that oxides were used by large and small battery manufacturers, and that batteries contained from 9 to 12 lbs. each of lead oxides. Price differences resulting from the zone differentials alone

amounted to ¼¢ to ½¢ per lb. as between competing battery manufacturers, and quantity differentials added from ¼¢ to ½¢ more, making differences in costs of 5¢ to 10¢ per battery. This was shown to have substantial competitive effects as between buyers in different zones and buyers of different quantities. Battery manufacturers operating in Birmingham, Alabama, Dallas, Texas, and Nashville, Tennessee, were shown to be in competition with each other and with chain and mail-order battery producers and others purchasing at par zone prices.

Paragraph 10-C: Four paint manufacturers of St. Louis, Missouri, testified as to conditions in their trade. They used variously from 4¼ to 8¼ pounds of lead pigments to a gallon of white or tinted outside paint, and from 14 to 20 pounds of red lead in red paint. These manufacturers were in the par zone but were in competition with other concerns likewise engaged and which are located in the states of Texas, Louisiana, Arkansas, Oklahoma, Mississippi, Kansas and Tennessee. Cost differences of from 5¢ to 10¢ per gallon of paint were shown to have substantial competitive effects in this trade.

Paragraph 10-D. The price difference on red lead of ¼¢ or more between car and less-than-car shipments made a difference to small paint manufacturers of 7¢ to 10¢ per gallon. On dry white lead it is not clear that there is a substantial unjustified quantity differential between carload and L. C. L. purchasers. The zone differential between Dallas and St. Louis is ¼¢ on less than car lots of red lead, and nothing on car lots. This makes a total cost difference of about ¾¢ per lb., or about 10¢ to 15¢ per gallon of red paint as between the small Dallas manufacturer and the large manufacturer in St. Louis. There is no price difference on oxides in car lots between the two cities. As between large and small paint manufacturers at all points in the ¼¢ zone, there is an unjustified price difference of ¼¢, or about 5¢ per gallon of red paint (Maps 3 and 4). On dry white lead the paint manufacturers of Dallas, St. Louis, Birmingham and other points in the par zone, as shown on Map 2, pay the same delivered price and are
902 all on an equal competitive basis. There are some discriminations in favor of par zone manufacturers against nearby manufacturers in the ¼¢ zone for dry white lead.

Paragraph 10-E: In the sale of lead-in-oil and other keg products, the quantity differential of ¼¢ per lb. as be-

tween 500 lbs. and less was not shown to have any basis in differences of costs of any kind. The difference between consignment dealers' prices and those of other dealers was not shown to be based on differing costs, and gave the consignment dealer an advantage of 1¢ per lb. over competitors in the same location. Differences in mill nets resulting from shipments from par points to par destinations or from par points to premium zone destinations where the added increment was no more than the additional freight were not shown to have involved local price or cost disadvantages as between dealers at the various points. And it was not shown that this involved any such disadvantage to any processors of keg products.

Paragraph 10-F: As between respondents, the zone prices, as well as the quantity, quality, and container differentials, appear from all the evidence to have had the tendency and effect of producing uniformity of prices and lessening price competition between themselves. This results from the uniform employment of the methods as the result of a general understanding, acceptance and voluntary employment of the plan, and not from discriminations per se.

Conclusions and Reasons.

Paragraph 10-G: Respondents' intra-zone prices involving differences in mill nets and average freight increments latent in the delivered price amounting to no more than 2½% to 3½% of the same, which delivered price was the same to all customers in the zone regardless of distance, were not shown to have lessened competition between these customers. The theory of the complaint is that purchasers located near production and shipping points paid prices yielding the highest mill nets and were the ones receiving the maximum disadvantage. But these were claimed and shown to be the principal ones who were crowding the distant manufacturers of batteries and paints to the competitive wall. Were all customers given an f.o.b. mill price, the near-mill customer would enjoy a predominating advantage up to the door of his distant competitor and an equal advantage in all territory beyond, so that the small concerns located further from shipping points would be run out of business, and the competition now afforded by these would be destroyed. It cannot, therefore, reasonably be inferred that the prices here employed intra-zone lessen competition between customers to a substantial degree.

903 Paragraph 10-H: Respondents' inter-zone prices are in fact different prices. They differ to the extent of the zone premiums, and are justified only where the additional freight equals or exceeds the zone premium. Where the differences in freight or other costs do not equal or exceed the differences in price, they are discriminatory. In a substantial number of cases the zone prices were not so justified. Cases heretofore pointed out are discriminatory, and such discriminations, in numerous cases, were shown to be substantial and sufficient to lessen competition between respondents' customers.

Paragraph 10-I: The different charges made by respondents based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs, and were therefore not discriminatory prices. These charge variations were the same to all customers and had no effect on competition between customers. Respondents' differing charges between grades of red lead as shown were no more than corresponding differences in cost as between the grades. The prices were given to all customers, and had no effect on competition between customers.

Paragraph 10-J: The differing prices between carloads of oxides and 5-ton lots, and between these and smaller quantities, which were charged by all respondents except Anaconda, and the extra zone charge for less-than-car quantities in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by differences in costs of manufacture, sale, or delivery, and were therefore discriminatory. The effects of these were shown to be substantial and to have the tendency and effect of lessening competition between large and small customers, to the injury of the latter.

Paragraph 10-K: The differential charged by all respondents on basic lead carbonate (dry white lead) of ½¢ per lb. between car and less-than-car shipments was no more than differences in the cost of sale and delivery of said products. No lessening of competition between customers was shown to have resulted from this practice.

Paragraph 10-L: The differential of ½¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not shown to be justified by differences in costs of any kind. In the retailer and painter trade where this was applied, the differential does not appear to have substantial effects, since the purchase of the larger quantity involved approximately the outlay ow $50 and was within

the reach of the smallest dealer. No competition was
904 shown between customers who bought the different quantities, and no inference of injury can be drawn with respect thereto.

Conclusions of Law.

Paragraph 11-A: The employment by each respondent of inter-zone price differentials where the price differences were more than differences in freight or other costs, as heretofore shown, and where the differences, as shown, were substantial, had the tendency or effect of lessening competition between customers of the sellers and of creating a trade advantage in favor of customers in the par zone or elsewhere who received the lower prices. In these instances all of the unequal features of "phantom freight" were present, and customers so discriminated against were disadvantaged competitively at all points. The practice in the circumstances shown is violative of the Clayton Act as amended (49 Stat. 1526; 15 U. S. C. A. Sec. 13; *Sugar Institute* v. *United States*, 297 U. S. 553, 591, 605. See also *Western Union* case, 181 U. S. 92).

Paragraph 11-B: The employment by all respondents except Anaconda of differentials between carloads, 5-ton lots, and smaller quantities of oxides, and the imposition of an additional ½¢ per lb. charge on less than car lots in the states of Montana, Wyoming, Colorado, and New Mexico, were not justified by any differences in costs and were discrimination between large and small customers which lessened competition between them, and are in violation of the Clayton Act as amended (*supra*. See *Corn Products Refining Company* vs. *Federal Trade Commission*, 324 U. S. 726, and cases there cited).

Paragraph 11-C: The employment by an individual respondent of a flat delivered price in a specified territorial zone where, as in this case, the delivered prices were based on average delivery costs for the zone, and where no substantial lessening of competition was shown to have resulted therefrom in any line of commerce in which customers of the seller were engaged, does not come under the prohibitions of Section 2(a) of the Clayton Act, as amended.

Paragraph 11-D: The acts and practices of respondents set out in Paragraphs 10-I, 10-K, and 10-L were, for reasons there stated, not in violation of the said Clayton Act. The differences between car and less than car shipments of

basic lead carbonate, the container differentials, the quality differentials for red lead, and the differentials between 500 lbs. and less on keg products are no more than "differences which normally arise in the buying of smaller or larger quantities" or in the buying of different qualities. (*Morton Salt Co.* v. *Federal Trade Commission*, 162 Fed. (2), 949; *Corn Products* case, *supra*).

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It is therefore recommended that the Commission issue and serve upon the respondents the following order based on the foregoing facts and conclusions and on the entire record, to wit:

V. Recommended Order.

This proceeding having been heard by the Federal Trade Commission upon the complaint and amended complaint of the Commission, the answers of the respondents thereto, testimony and other evidence thereon taken before a duly authorized Trial Examiner of the Commission, the recommended decision of the Trial Examiner and exceptions thereto, briefs in support of complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and of the Clayton Act,

1. It Is Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, co-operating in, continuing or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents and others not parties hereto, to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, and inducing resale price uniformity through the employment of the following or similar methods, to wit:

1-A. Quoting and/or selling lead pigments at specified price differentials depending upon size or type of con-

tainers; or upon size or type of shipment to customers; or upon the type of business in which customers may be engaged;

906 1-B. Quoting and/or selling red lead and litharge at specified differentials over any particular quotation or particular quotations of pig lead prices;

1-C. Issuing to dealers suggested resale prices, dealers' price schedules, or list prices with the purpose and effect of inducing dealers to observe uniform resale prices and refrain from price competition between themselves;

1-D. Quoting and/or selling lead pigments at price differentials between zones as involved in the delivered price zoning system set out in Paragraph 2 below, or as involved in any similar plan producing identical or uniform price variations between territorial divisions.

2. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, Anaconda Copper Mining Company and International Smelting & Refining Company, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in said commerce, do forthwith cease and desist from entering into, co-operating in, continuing or carrying out any plan, common course of action, understanding, agreement, combination or conspiracy between any two or more of them, or between any one or more of said respondents and others not parties hereto, to establish and maintain uniform prices, terms, price differentials conditions of sale, and/or inducing resale price uniformity through the employment of the following or similar methods, to wit:

2-A. Quoting and/or selling lead pigments at delivered prices calculated or determined pursuant to or on the basis of zone or territorial divisions as set forth with more particularity in the maps attached to and made a part of the findings of fact hereof, or in accordance with any other co-operative plan, system, or formula which produces identical or uniform delivered price quotations or prices for lead pigments by respondents using such plan, system, or formula;

2-B. Entering into, employing, or continuing consignment or agency contracts or arrangements whereby prices and selling practices of dealers or distributors are controlled or directed, except that this provision shall not apply to Respondents Anaconda and International.

907 3. It Is Further Ordered that respondent National Lead Company, its officers, representatives, agents, sale, employees, in or in connection with the manufacture, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from acquiring or seeking to acquire, directly or indirectly, by means of any corporate or other device, any interest of ownership or control in the physical assets, plants or other properties, or in the capital stock of any concern or enterprise which is now or at the time of such acquisition or proposed acquisition may be an actual or potential competitor of said National Lead Company in the manufacture, sale, or distribution of lead pigments.

4. It Is Further Ordered that each of the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, representatives, agents, and employees, in connection with the offering for sale, sale, or distribution of lead pigments in commerce, as "commerce" is defined in the Clayton Act, between and among the several states of the United States and in the District of Columbia, do forthwith cease and desist from discriminating directly or indirectly in the price of said products of like grade and quality as among customers who are in competition with each other when the differences in price are not justified by differences in the cost of manufacture, sale, and/or delivery resulting from the differing methods or quantities in which such products are sold or delivered by the following or similar methods, to wit:

4-A. Selling lead pigments at different zone delivered prices to customers located in different zones who are in competition with each other;

4-B. Selling lead oxides at different quantity price differentials between car and 5-ton shipments and between 5-ton and smaller shipments to customers who are in competition with each other (except that this provision shall not apply to respondent Anaconda Copper Mining Company or to respondent International Smelting & Refining Company).

5. Is Is Further Ordered that each respondent shall, within sixty (60) days after service upon it of this order,

file with the Commission a report in writing setting
908 forth in detail the manner and form in which it has complied with this order.

Rulings on the proposed findings and conclusions submitted by counsel are transmitted to the Records Division herewith.

This at Washington, D. C., on the 31st day of March, 1948.

Respectfully submitted,
John W. Norwood,
Trial Examiner.

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912 BEFORE FEDERAL TRADE COMMISSION.

(Caption—5253)

EXCEPTIONS OF COUNSEL SUPPORTING THE COMPLAINT TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

(Received May 21, 1948.)

Come Now Joseph S. Wright and Paul R. Dixon, counsel supporting the complaint in the above matter, and except to the Trial Examiner's Recommended Decision, as follows:

Exception I.

Exception is taken to failure of the Trial Examiner to include in his statement of the allegations of the complaint on page 4 and in his statement of the issues raised by the pleadings on page 6 the allegations of the complaint contained in Paragraphs Eight, Nine and Ten of the amended complaint and the issues raised by the pleadings of use by each of the respondents of the various zone delivered price quotations and methods of quoting prices for the purpose and with the effect of enabling them to eliminate price competition by quoting identical delivered prices. The allegations of Paragraphs Eight to Ten of Count I of the amended complaint are in addition to the conspiracy and combination charges and raise issues in addition to those stated by the Trial Examiner at page 6 of his Recommended Decision.

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Exception II.

Exception is taken to the oversimplification of the definition of the products involved in the proceeding at page 7, and to omission of the detailed definitions and descriptions contained in Part I, Paragraphs 1 through 7 on pages 1 to 3 of the proposed findings and conclusions submitted to the Trial Examiner by the undersigned.

Exception III.

On page 7 the Trial Examiner finds that respondents Glidden and Sherwin also manufactured and sold mixed paints. In fact, each of the respondents except Anaconda and International have at some time during the period covered by the record produced and sold mixed paints or the equivalent, lead pigments in such form that they may be applied directly without further processing.

Exception IV.

Exception is taken to the Trial Examiner's statement appearing in Paragraph (1-d) on page 9 and 1-I on page 63 listing together the branch offices and plants of National in such fashion as to indicate that pigment manufacturing plants are operated in Omaha, Nebraska; Buffalo, New York; Boston, Massachusetts; New Orleans, Louisiana; Cincinnati and Cleveland, Ohio; and Pittsburgh, Pennsylvania. While those cities designated particularly above are branch offices of National, no pigment manufacturing operations are conducted therein nor have such operations been conducted for many years.

Exception V.

Exception is taken to failure of the Trial Examiner to find in Paragraph (1-f) on page 10 and 1-K on page 64 that the Eagle-Picher acquired by National in the early 1930's was acquired in the name of E. J. Cornish as an individual, who was at the time Chairman of the Board of the National Lead Company, and that other stocks owned by National were held in the name of the corporation outright (tr. 3313-14); and that the real purpose of holding such stock in the name of Cornish was to conceal the purpose of National to acquire control of Eagle-Picher.

914 Exception VI.

Exception is taken to the statement at various places in the Trial Examiner's Recommended Decision to the effect that respondent Glidden "sold f. o. b. various shipping points in the par zone". This statement appears in Paragraph (4) on page 14, Paragraph (4-d) on page 19, Paragraph (5-c5) on page 30, Paragraph (7-a3) on page 39, Paragraph (7-b3) on page 42, Paragraph 4-D on page 69, Paragraph 5-C5 on page 76, Paragraph 5-C7 on page 77, Paragraph 7-A3 on page 81, and Paragraph 7-B3 on page 83.

Respondent Glidden admitted in its answer to the amended complaint, and has never sought to indicate otherwise in this proceeding, that it has employed the zone method of pricing substantially as set forth in the complaint. (See answer of Glidden pp. 3, 4, 8; Glidden Proposed Finding No. 14.)

Exception VII.

Attorney in support of the complaint excepts to the Trial Examiner's findings that Sherwin-Williams did not follow the zone system at the following places: Paragraph (4) on page 14, Paragraph (4-d) on page 19, Paragraph (5-c5) on page 30, Paragraph (7-a3) on page 39, Paragraph 4-D on page 69, Paragraph 5-C5 on page 76, Paragraph 5-C7 on page 77, Paragraph 7-A3 on page 81, Paragraph 7-B4 on page 84.

An examination of the white lead-in-oil price lists of both respondents Glidden and Sherwin-Williams discloses a statement on the face of each a list of f. o. b. points or shipping points (see Cx. 662-Y and 663-A).

Both price cards, without more, would indicate an offer to sell at the listed points, the customer to pay the freight to destination. In fact, however, the lists of points on both Glidden and Sherwin-Williams price cards are warehouse points rather than points for price making. As shown above under Exception VI, listing of f. o. b. points did not mean that Glidden added freight to any zone delivered price.

915 It is plain from the record that Sherwin-Williams likewise followed the zone system in its quotations of prices on lead pigments, and that the so-called list of

shipping points on the Sherwin-Williams price lists were not in fact f. o. b. points from which freight was added in any but a small number of instances, as will appear more fully below. The General Trade Sales Bulletins from the headquarters of the Sherwin-Williams Company to the branches and sales personnel frequently refer to the zones. For instance, Cx 662-f, General Trade Sales Department Bulletin No. 24, under date of December 28, 1936, contains the following statement:

"Zone Differentials.

On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert." Other subsequent Trade Sales Department Bulletins contain similar instructions and above them contain the descriptions:

"Consumers Prices—Eastern Zone"

"S-W Dealers—Eastern Zone"

(Cx 662-I and following sub-numbers).

Ex. 782-D is a price bulletin by the San Francisco office of Sherwin-Williams showing the application of the zone system as such to all of the business of Sherwin-Williams on the Pacific Coast.

As to red lead and litharge, Cx. 823 A-G shows that while Sherwin-Williams apparently did charge freight on less-than-carload shipments of these products from warehouses (823-A and B) during 1932 and 1933, beginning in 1934 when the zone system was adopted delivered price quotations were made in accordance with the zone plan adopted by the industry and continuing down to 1942 (823-C to G).

Respondent Sherwin-Williams sought to introduce evidence that it had not followed the zone system, in spite of the exhibits referred to above and in spite of the fact
916 that at no point in any of the price lists, nor in the instructions to branch personnel as to the method of quoting prices, is there any indication that freight is to be added from the so-called shipping points on the price cards. A vice-president of Sherwin-Williams testified categorically that it was the unfailing practice of the company to add some freight charge on any shipment to a destination other than a listed shipping point. (Tr. 1314-20)

The introduction of more than a hundred invoices into the record (Cx. 833A to Z 100) showed this statement to be entirely contrary to the facts; and other witnesses were offered by Sherwin-Williams to attempt to explain away the discrepancy between the printed pricing instructions and invoices on the one hand and the testimony of the witness Coolidge on the other. This explanatory testimony (witnesses Brown, tr. 3694; Lemke, tr. 3743; and Lewis, tr. 4103) is conflicting and vague and does not refute the inference that must be drawn from the invoices appearing in the record showing adherence to the zone system in actual sales and from the detailed instructions to sales personnel as to pricing practices.

It is submitted, therefore, that there is no basis for the finding of the Trial Examiner that either Glidden or Sherwin-Williams did not follow the zone system to practically the same extent as all of the other respondents.

Exception VIII.

Exception is taken to statement of the Trial Examiner in Paragraph (4-a) at page 16 that "Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 per cwt. for litharge over Smelting's closing price * * *". The record shows that only red lead and litharge were sold at such differentials and that so-called card prices were quoted on all other lead pigments.

Exception IX.

Exception is taken to Paragraphs (5-a2) and (5-a3) at page 20 and 5-A2 and 5-A3 at page 70. In these paragraphs the Trial Examiner finds that the purpose of the committee meetings were for recommending provi-
917 sions of a Supplemental Code of Fair Competition "to regulate particular methods of packaging, selling, and delivering lead pigments", and further finds that Schedule A of the Code "provides for basing carload prices for lead oxides on Smelting's New York price, * * *"

It is apparent from all of the documents relating to the Code discussions and the various drafts of Codes adopted by the committees and by the final approved draft of the Code itself (Cx. 809) that it was never intended that the

Code would itself regulate or establish any business practices. Schedule A did not provide that carload prices were to be based in any particular fashion. The only provision of the Code which could possibly be relied upon by the respondents as a defense in this case was Article VII, Section 2, and the attached Schedule A, which provided for nothing more than the *filing* with the Code Authority details of transactions which were made on any other basis than those contained in Schedule A.

Exception X.

Exception is taken to all of those figures appearing in the table set out by the Trial Examiner in Paragraph (5-b6) at page 26 which are not identical one with the other for comparable dates.

The Trial Examiner lists a card of Glidden under date of 10/20/37 which appears to be 50¢ lower than all of the cards of the other respondents under dates of September 13 to 15, 1937. One price card of respondent Glidden was not furnished the Commission, and by the serial numbers appearing upon the previous and subsequent cards (Cx. 663-D, E) it is apparent that there was a price card on about September 15, 1937 which does not appear in the record. An examination of the price cards of the other respondents on about 10/20/37 shows them to be identical with Glidden, so that it is an unwarranted assumption that Glidden was 50¢ below scale on 9/15/37.

The quotations for Eagle-Picher and Anaconda for 25 lb. and 12½ lb. kegs during January, 1938, and March, 1939, appear in the Trial Examiner's table to be slightly higher than those of the other respondents. Eagle-Picher and Anaconda chose to quote on these smaller packages a price per unit of 25 or 12½ lbs. rather than a price based on 100 lbs., as did the other respondents. Since there is a fraction of a cent involved in dividing the cwt. price by 4 or 8 to determine the 25 or 12½ lb. container price, in quoting on such single containers Eagle-Picher and Anaconda used the even cent next above the fraction. In computing his table the Trial Examiner apparently multiplied this unit price by 4 or 8, multiplying the "breakage" in the unit price. This is not a real price difference since in quoting on a single unit any of the other respondents would have used the full cent above the fraction. Furthermore, all of the respondents, including

Eagle-Picher and Anaconda customarily quoted a 50¢ differential per cwt. between each size of container from 100 lbs. down to 12½ lbs.

In the price quotation of Anaconda under May 3, 1941, the Trial Examiner included a price card for the plus ½¢ zone, or zone 2, which was 12½¢ above the par zone quotation (see tr. 231). The Trial Examiner should have cited Cx. 661-V which is the par zone price card for the same date which is identical with the comparable prices of the other respondents (tr. 229).

The Trial Examiner should have found that the consumer, painter and industrial price quotations of the respondents are and have been identical in every respect during the period of the conspiracy.

Exception XI.

Exception is taken to Paragraph 5-B6 on page 73 where the Trial Examiner finds that there were slight variations in quoted prices by Glidden or Anaconda based upon the errors in the table subject to Exception X.

Exception XII.

Exception is taken to the so-called table of parallel quotations on white lead-in-oil in Paragraph (5-c5) on page 29. It is apparent that the Trial Examiner has placed side by side quotations of National to "dealers" as that term is understood by National, rather than "distributors" 919 who were in fact the bulk of the dealers to whom a lower price was given; has included quotations applicable to other zones than the par zone; and has used at least one price list which is on a different date than those of the other respondents. The net result of the scrambling of quotations indicates a dissimilarity in prices to dealers which did not in fact exist.

At that time, and at all times during the period from 1933 to 1942 at least Eagle-Picher and National quoted the same prices to comparable classes of customers for comparable products and the prices of respondents Glidden, Sherwin-Williams and Anaconda were customarily 25¢ below National's Dutch Boy and Eagle-Picher's Eagle brands of white lead-in-oil.

Exception XIII.

Exception is taken to the table entitled "Sales of White Lead-in-Oil—Par Zone—Price per Cwt.—January Through March, 1941" in Paragraph (5-c6) on pages 31 and 32.

While the Trial Examiner's conclusion in Paragraph (5-c7) on page 33 that the record of sales reveals a complete uniformity in price between National and Eagle-Picher, there are errors in separating "agents", "distributors" and "dealers" into comparable classes. The classification "dealers", as employed by Eagle and National, was a special classification of accounts to whom consignment sales were not offered and who were quoted and sold at a price of $1.00 per cwt. above competing dealers who were sold on the consignment basis. Inclusion of these transactions as to "dealers" for National and Eagle-Picher with "dealers" of Anaconda, Sherwin-Williams and Glidden makes it appear that there was a much more substantial difference in prices offered by the respondents than was the fact and throws the table completely out of line. The following statement in Paragraph (5-c7) at page 33 that there were substantial variations between the prices of National and the substantially uniform lower prices of Anaconda, Glidden and Sherwin-Williams is not justified. Exception is also taken to a similar statement in Paragraph 5-C7 at page 77. A checking of the citations of the Trial Examiner to the above table reveals numerous errors not only in classification of customers but in the prices shown by the original exhibits to have been charged.

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Exception XIV.

Exception is taken to the Trial Examiner's statement in Paragraph (5-c7) on page 33, based upon the table covered by the previous exception, that two distributor sales by Eagle-Picher were 25¢ under National's price to agents; to the statement that Anaconda made 220 sales at $1.25 less than National's lowest price; that Glidden made 70 sales at $1.20 lower than National's lowest price; and that Sherwin-Williams made 34 sales at $1.25 and 5 sales at $1.75 under National's lowest price.

The two sales which were said to be deviations by Eagle-Picher were sales of Hammer Brand white lead-in-oil, Eagle-Picher's second brand which customarily and regularly sells at 25¢ less than its own Eagle Brand and Na-

tional's Dutch Boy. The more than 300 sales said to have been made by Anaconda, Glidden and Sherwin-Williams at more than $1.00 less than National's lowest price apparently are derived from the last part of the table on page 32 where National and Eagle's "dealer" price was used instead of the "agent" or "distributor" price to customers comparable with the "dealers" of Anaconda, Sherwin-Williams and Glidden. By reducing the stated National and Eagle-Picher price of $11.25 to the proper $10.25 price to agents and distributors, the seemingly wide disparity in prices between the respondents disappears. By applying the proper $10.25 price, the price difference is customarily 25¢ as to Anaconda and Sherwin-Williams and 20¢ as to Glidden, which were the differentials in prices to comparable dealers which maintained over a considerable period of time, and as charged in the complaint (Paragraph 7 B-2, Count I).

Exception XV.

Exception is taken to the Trial Examiner's statement in Paragraph (5-c10) on pages 33 and 34 "with occasional exceptions covered by contract sales and sales to battery manufacturers, prices of the three were uniform".

The word "some" should be inserted before the second word "sales" and the word "large" should be inserted before the word "battery" so that the finding will reflect accurately the record, which shows that only on occasional instances involving large battery manufacturers who were in a position to produce their own oxides did the respondents make concessions from the "regular" prices. The same exception applies to comparable Paragraph 5-C10 on page 77.

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Exception XVI.

Exception is taken to so much of the Trial Examiner's findings in Paragraphs (6-b) (6-c) and (6-d) on pages 36 to 38 and to Paragraphs 6-B, 6-C, and 6-D on pages 79 and 80 as indicate that there is no substantial disadvantage or injury to any group of customers inherent in the zone system as practiced by the respondents or that the zone system does not involve a substantial surrender of territorial advantages by any respondent.

The detailed reasons in support of this exception will appear subsequently in the exceptions to comparable find-

ings as to Count II and in the main brief in support of the complaint and will not be repeated here.

For the purposes of Count I of the complaint it is sufficient to find that the use of the zone system did in fact eliminate competition in a substantial fashion between and among the respondents and did deprive customers wherever located from the natural benefits of that competition.

The Trial Examiner does so find that the effect of zone pricing system as practiced by the respondents enabled all producers to eliminate competition and had the tendency and effect of suppressing competition and restraining trade. The findings mentioned above in 6-B, C and D indicating an advantage to distant customers in the zone system and indicating that there was no surrender of territorial advantage are gratuitous and in the latter instance contrary to the record.

Exception XVII.

Exception is taken to the finding of the Trial Examiner in Paragraph (7-b2) on page 41 and 7-B2 at page 83 that respondent Anaconda is not shown to have agreed to any pricing methods and that it failed to employ zone prices and differentials so as to produce matched prices with National and Eagle-Picher.

While the Trial Examiner does find in these paragraphs that Anaconda participated in the conspiracy, the statements excepted to indicate that the participation was on a limited and perhaps reluctant basis. The evidence is
922 clear that Anaconda did adopt at about the same time as the other respondents the zone system and that it quoted and sold in accordance therewith, publishing list and resale prices identical in every respect with the prices of the other respondents. It is conceded that on white lead-in-oil Anaconda dealers were given a price 25¢ lower than those of National and Eagle-Picher. This was explained by Anaconda as an effort to compensate the dealer for his handling of a brand of product less well known than Dutch Boy or Eagle (tr. 3513).

As the Trial Examiner found, the representatives of Anaconda participated in the meetings of the committees out of which arose the agreement to employ the zone system and there is nothing in the record as to their adoption of it which places them on any different basis than the other respondents.

Exception XVIII.

Exception is taken to the Trial Examiner's finding in Paragraph (7-C2) on page 43 and 7-C2 on pages 84 and 85 to the effect that while the zone system had the effect of suppressing competition and restraining trade as between the respondents it did not have the tendency or effect of suppressing competition between purchasers in the same zone. This whole statement is as follows:

"The practice, as shown, did not have the tendency or effect of suppressing price competition between purchasers in the same zone, for it enabled all who purchased for resale to secure their goods at the same cost, so that they had an equal competitive advantage. This carries no inducement to sellers to maintain the same resale price, but had the beneficial effects contemplated by the Robinson-Patman Amendment. As between near-mill purchasers and others in the same zone, the flat zone price enlarges the areas of equal competitive opportunity and tends to distribute the locations of processing enterprises in a way that is economically healthful."

923 The Trial Examiner is in error in his statement that the zone system did not have the tendency or effect of suppressing competition in the secondary line as will more fully appear in exceptions to similar findings relating to Count II and in the brief. The Trial Examiner is in error in his construction of the Robinson-Patman amendment as being intended to prevent near mill purchasers from receiving the natural benefit of their location and in his conclusion that it is to their competitive advantage to enable distant competitors to purchase at the same cost and then ship finished products back to compete with them.

Exception XIX.

Exception is taken to Paragraph (7-c3) on pages 43 and 44 and 7-C3 on page 85.

The use by the Trial Examiner of the arbitrary figure 2.2% as a measure of the freight disadvantage to the near mill purchaser (the source of which is seen in Paragraph (6-b) on page 36) is entirely misleading and in fact the freight disadvantage is often considerably greater. The Trial Examiner states that failure to extend the freight advantage to near-mill customers does not, in the absence of large freight factors, appear to involve substantial ef-

fects which would tend to lessen price competition, and he further states in the same paragraph, "The practices as employed here were not shown to involve an undue increase of prices generally in order to enable sellers to ship beyond their legitimate territories."

While these points encompass the whole question of whether the flat zone price involves discriminations affecting substantially competition in the secondary line, a question which can only be dealt with adequately in the main brief, one situation shown in the record clearly refutes the Trial Examiner's statements in this paragraph. Rx. 162-C shows freight costs on shipments of dry white lead to Texas points from the St. Louis plant of National ranging from a minimum of $.58 per cwt. to a maximum of $1.88 per cwt. These freight charges range from 7.4% to 24% of the then current delivered price of dry white lead in less-than-carload quantities (7¾¢ per lb.). Testimony of the St. Louis paint manufacturer customers of National shows that they were engaged in vigorous competition with the Texas customers receiving freight advantages of as much as 24%.

924 In Paragraph 10-c on page 92 the Trial Examiner finds that there is as much as 8¼ lb. of white lead in a gallon of paint and that manufacturers of paint in St. Louis were in competition with Texas manufacturers to an extent that cost differences of from 5 to 10¢ per gallon of paint have substantial competitive effects in the trade. In the face of the Trial Examiner's own findings and the respondents' own exhibits showing the amount of freight absorbed in shipping white lead from St. Louis to Texas, is is apparent that the St. Louis manufacturers were placed at a cost disadvantage of up to more than 15¢ per gallon of outside white paint, which cannot be characterized as insignificant or without injury to competition in the secondary line.

Furthermore, inclusion in the zone price of an "average" freight figure has the necessary effect of enhancing unduly the price of pigments to the near-mill customers and is in every respect comparable to the "phantom freight" charges found by the Supreme Court to be objectionable in the "Corn Products" case (*Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726).

Exception XX.

Exception is taken to that portion of Paragraph (10-d) on page 55 which relates to the carload differential on dry white lead; to Paragraph (10-k) on page 57; to Paragraph (9-e) on page 52; to Paragraph 9-E on page 91; to Paragraph 10-K on page 94.

In all of these paragraphs the Trial Examiner deals with the ½¢ per lb. quantity discount on dry white lead. It is conceded that the record shows the difference in carload as against less-than-carload freight rates to be sufficient to justify this price difference in most transactions where rail freight is involved. However, the principal paint manufacturing centers of the United States are in and around St. Louis, Missouri; Chicago, Illinois; Philadelphia, Pennsylvania; and New York, New York; all of them cities containing a white lead producing plant of one or the other of the respondents. There is no evidence which would justify the ½¢ differential as to customers where the mode of delivery is local cartage, and apparently respondent
925 National recognizes that this differential as applied to the local customers cannot be justified since in the cost data which were introduced for the purpose of justifying this differential (Rx. 215 A-B) all sales to customers in and around the manufacturing plant cities were pointedly omitted and the justification figures relate only to those transactions where rail freight is involved.

Exception XXI.

Exception is taken to Paragraph (10-b) on pages 53 and 54 and the corresponding Paragraph 10-B on page 92.

The Trial Examiner errs in failing to conclude on the evidence of various battery manufacturers called as witnesses that the storage battery manufacturing business was highly competitive on a price basis from 1933 to 1941; that price differences of a very few cents on smaller batteries determined sales; that large battery manufacturer customers located at considerable distances from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other pigment producing centers, at prices below the cost of manufacture of comparable products to the smaller battery producers located in such centers (tr. 1674-2017).

The Trial Examiner errs in finding that the ten small

battery manufacturers who testified that a saving in cost of materials of from 5 to 10¢ per battery would be of competitive advantage were located outside of Chicago. Reference to the transcript citations by the Trial Examiner shows that five of these battery manufacturers were located in the city of Chicago, Illinois, and two of them in St. Louis, Missouri, where oxide plants of National and Glidden (Hammond, Indiana, in the Chicago switching area) are located.

The Trial Examiner erred further in failing to include the cities of Chicago, Kansas City, and St. Louis, Missouri, as among those cities where battery manufacturers were in competition with chain and mail order battery producers.

926 Exception XXII.

Exception is taken to the findings of the Trial Examiner in Paragraph (10-d) on page 55 and Paragraph 10-D on page 92.

The Trial Examiner is in error in his statement that there is no difference in zone differential on carload sales of red lead and litharge between Dallas, Texas, and St. Louis, Missouri. A glance at the "Carload Red Lead and Lead Zone Map" (Map No. 4 following page 14 of the Recommended Decision) shows that there was a 25¢ per cwt. differential between St. Louis and Dallas in carload quotations.

The Trial Examiner is in error in stating that since identical delivered price quotations on dry white lead are made to paint manufacturers in Dallas, St. Louis, Birmingham, and other points in the par zone, they are "all on an equal competitive basis". In fact, the dry white lead purchasers in St. Louis and other factory cities are deprived by such quotations of the natural advantage of their proximity to the plants and are required literally to pay the freight on dry white lead to their competitors in such localities as Dallas, Birmingham, and other more distant points.

Exception XXIII.

Exception is taken to Paragraphs (10-f) on page 55 and (10-m) on page 57, as well as the corresponding Paragraph 10-F on page 93.

The Trial Examiner states that the zone prices as well as quantity, quality and container differentials have the

effect of producing uniformity in prices and lessening competition as between themselves, and that this is the result of agreement and understanding rather than discrimination. This apparently is a suggestion that systematic discriminations, as are inherent in the use of the zone system by the respondents, cannot, if they are held to be part of an illegal conspiracy to fix prices, also be held to constitute discrimination under the Clayton Act. The record is
927 plain that the zone system produces systematically varying mill net discriminations, which cannot be justified on the basis of cost differences, for the very purpose of eliminating competition in the line of commerce in which the respondents are engaged. Thus, it is perfectly proper, and counsel supporting the complaint urge it most strenuously, that not only should the agreement and understanding to use the zone system be declared unlawful under Section 5 of the Federal Trade Commission Act, but that systematic use by each of the individual sellers for the purpose of eliminating competition, without regard to collusion and agreement, be declared unlawful under Count II of the amended complaint and Section 2 of the Clayton Act as amended. Full citation of the authorities on this point must necessarily await treatment in the main brief in support of the complaint.

Exception XXIV.

Exception is taken to Paragraphs (10-g) on page 56, (11-c) on pages 58 to 60, and the corresponding paragraphs 10-G on page 93 and 11-C on page 95.

All of the above cited paragraphs are to the effect that the delivered price applicable to any single zone is not, as utilized by the respondents here, a violation of Section 2 of the Clayton Act. This is based upon the conclusion of law that the delivered price quotation is necessarily the price in any transaction and that since there is no difference in delivered price to any customer within a zone on account of his location, there is no discrimination under Section 2(a). The Trial Examiner in effect lauds the single zone system, suggesting gratuitously that it promotes competition by placing the distant customers on an equal competitive footing with the near-mill customers.

Necessarily, comprehensive treatment of the facts and authorities in support of this exception must await the main brief in support of the complaint. Hence, reference

will only be made to the Trial Examiner's own finding in Paragraph 8-A1 on page 88, wherein he recognizes that there are two separate and distinct economic values, namely the cost of the goods and the cost of transporting the goods.

928 This finding takes into account the obvious—that there is necessarily included in the zone delivered price quotations of the respondents an arbitrary amount added to what the respondents expect to receive for their product at the mill, intended to cover cost of transportation incurred directly by the respondents or to be deducted from the invoice price or credited to buyers for transportation charges incurred by them. It also takes into account that this "hidden freight charge" is a separate thing from the cost of the goods placed in the hands of the carrier for shipment. The Trial Examiner should have found that the "hidden freight charge" is in fact a "phantom freight charge" when it is imposed upon near-mill customers and that there is involved an element of systematic freight absorption in selling to customers where freight charges must be absorbed above the hidden freight factor. The Trial Examiner should have found that the delivered price quotation was not in fact the price of the goods and that the respondents systematically discriminate in sales within any zone by varying the net price received at the shipping point with the amount of actual transportation involved. The Trial Examiner should have found that this systematic price discrimination was practiced for the purpose and with the effect of eliminating competition between the respondents and of nullifying any advantages of location to the market.

Exception XXV.

Exception is taken to Paragraph 2-B of the Recommended Order on page 97, which relieves respondents Anaconda and International from its provisions.

It is plain that Anaconda through its subsidiaries entered into "consignment arrangements" covering a large portion of its sales to dealers, and entered into consignment contracts, as such, in the State of Wisconsin. The only one of the respondents which did not participate in some way in the conspiracy to employ agency contracts was respondent Sherwin-Williams. It is submitted, however, that there should be no exception to the provisions of Paragraph 2-B

which covers a course of conduct clearly unlawful under Section 5 of the Federal Trade Commission Act and found to have been practiced in the industry for the purpose
929 of price fixing. That certain respondents did not participate in all of the overt acts of the conspiracy, or participated in them reluctantly, need not stay the Commission from ordering that all of the respondents refrain from conspiring to use such practices in the future.

Exception XXVI.

Exception is taken to failure of the Trial Examiner to include inhibitions in the order, based upon Paragraphs Eight to Ten of Count I of the amended complaint, as follows:

3. It Is Further Ordered that each of the respondents National Lead Company, The Eagle-Picher Company, Anaconda Copper Mining Company and International Smelting & Refining Company, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in said commerce, do forthwith cease and desist from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents:

3-A. Quoting or selling lead pigments at delivered prices calculated or determined pursuant to or on the basis of zone or territorial divisions, or in accordance with any other plan, system, or formula which produces identical or uniform price quotations or prices.

3-B. Quoting or selling lead pigments at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation to the point of shipment or to destination.

Exception XXVII.

Exception is taken to failure of the Trial Examiner to include in the Recommended Order a prohibition against the type of price discrimination which he found to have
930 been practiced by respondents National, Eagle-Picher, and Anaconda in Paragraph 9-A on pages 89 and 90. The Trial Examiner's finding that there was a discrimination between the so-called "distributors" and "dealers"

is sound and the record amply supports the conclusion that for the purposes of Section 2(a) of the Clayton Act the relations of the respondents to their so-called consignment distributors made the latter customers. It was admitted by National's Manager of Trade Sales that distributors and dealers were engaged in the same business, often in the same cities, and that they were in many instances in competition with each other. He further admitted that white lead-in-oil was known in the trade as a low-margin item and that National had received many complaints from the favored distributors that their margin was too low. It necessarily follows that if the margin to distributors was too low for them, the margin to dealers, from 25 to 33⅓% less than the margin to distributors, is likely to have serious competitive effects upon the dealers (Tr. 3001-3007; Tr. 3902; Cx. 858, 859, 860).

Exception XXVIII.

Exception is taken to the Trial Examiner's conclusion in Paragraph 11-D on page 95 that the ½¢ per lb. differential for carload shipments of white lead does not constitute a violation of Section 2(a) of the Clayton Act, and to his failure to include in his Recommended Order an inhibition against engaging in this discrimination in sales to competing customers in or near the white lead producing points (see Exception XX supra).

Exception XXIX.

Exception is taken to failure of the Trial Examiner to include in his Recommended Order a prohibition against the discriminations practiced by the respondents in systematically varying their net prices in sales within zones as recommended by counsel supporting the complaint in Paragraph IV(1) and sub-numbers of the Recommended Order to Cease and Desist proposed to the Trial Examiner under date of January 22, 1948.

931 Exception XXX.

In addition to the foregoing, counsel supporting the complaint except to every portion of the Trial Examiner's Recommended Decision which is inconsistent with and con-

trary to the Proposed Findings, Conclusion and Order to Cease and Desist filed with the Trial Examiner by counsel supporting the complaint on December 29, 1947, and January 22, 1948.

Respectfully submitted,
Joseph S. Wright,
Assistant General Counsel,
Paul R. Dixon,
Trial Attorney.

Richard P. Whiteley,
Chief Trial Counsel.

May 20, 1948.

933 UNITED STATES OF AMERICA.

Before the Federal Trade Commission.

* * (Caption—5253) * *

EXCEPTIONS OF RESPONDENT, NATIONAL LEAD COMPANY, TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice:

Exceptions to Section I of the Recommended Decision, entitled "Proceedings":

1. This respondent excepts to the statement in the third sentence of the fourth full paragraph on page 2 of the Recommended Decision that "Proposals were thereupon duly filed by all parties, * * *". The proposals submitted by the attorney in support of the amended complaint were not filed within the time fixed by the Commission.

Exceptions to Section II of the Recommended Decision, entitled "Pleadings and Issues":

2. This respondent excepts to item "2" under "Count One" of "Outline of Complaint" on page 3 of the Recom-

mended Decision (Paragraph Seven A [8] of the Amended Complaint).

934 3. This respondent excepts to item "5 (d)" on page 4 of the Recommended Decision (Paragraph Nine B of the Amended Complaint).

4. This respondent excepts to item "5 (e)" on page 4 of the Recommended Decision (Paragraph Nine C of the Amended Complaint).

5. This respondent excepts to the second full paragraph on page 5 of the Recommended Decision, which purports to summarize the answer of this respondent to the amended complaint (Answer to Amended Complaint of Respondent, National Lead Company).

6. This respondent excepts to the third full paragraph on page 5 of the Recommended Decision as being an incomplete, as well as inaccurate, summary of the answers of the respondents to the amended complaint (Answers to Amended Complaint of all respondents).

7. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?" (Federal Trade Commission Act, Section 5.)

8. This respondents excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?" (Tr. 4209-4252; Proposed Findings and Conclusions submitted by the attorney in support of the amended complaint; Federal Trade Commission Act, Section 5.)

9. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?" (Amended Complaint, Paragraph Seven
935 B [7]; Tr. 4209-4252; Proposed Findings and Conclusions submitted by the attorney in support of the amended complaint; Federal Trade Commission Act, Section 5.)

10. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Were the tendencies and effect of these practices to restrain trade, suppress competition, or create monoply through unequal cost factors and identical delivered prices?" (Amended Complaint, Paragraph Eleven; Federal Trade Commission Act, Section 5; Sherman Act, Sections 1 and 2.)

11. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did respondents' employment of the zone system as alleged involve differences in price between customers (a) located in a zone, and (b) located in different zones, which differences were more than differences in cost of sale and delivery?" (Clayton Act, Section 2[a].)

12. This respondent excepts to the inclusion on page 6 of the Recommended Decision of the following as one of "The Issues" herein:

> "Did each respondent so discriminate in price between customers through the granting of different trade, regional and quantity discounts?" (Clayton Act, Section 2[a].)

13. This respondent excepts to the second sentence in the paragraph beginning at the bottom of page 6 of the Recommended Decision upon the ground that there is no room for the employment of "inference" where there is reliable, probative and substantial evidence and that, in any event, no "inference" could be drawn which conflicts with such reliable, probative and substantial evidence.

14. This respondent excepts to the first three full sentences appearing at the top of page 7 of the Recommended Decision upon the ground that, in many instances, "important portions" of the evidence have not been set
936 forth in the Recommended Decision, reliable, probative and substantial evidence has been ignored, evidence has been misquoted, and no reasonable regard has been had for the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision, entitled "Report Upon the Evidence":

15. This respondent excepts to the first paragraph under the heading "Count One" of the "Report Upon the Evidence" upon the ground that the facts of organization, location, control, interstate commerce and business of each respondent are not shown by the record to be substantially as set out in the amended complaint.

16. This respondent excepts to the second and third paragraphs under the heading "Count One" of the "Report Upon the Evidence" appearing at page 7 and the top of page 8 of the Recommended Decision, except the last sentence thereof which appears as the first full sentence at the top of page 8 of the Recommended Decision, insofar as the same do not correspond to paragraphs 2 through 5 inclusive of the proposed findings of fact heretofore submitted by this respondent and the record citations contained in said proposals are herein incorporated by reference.

17. This respondent excepts to the statement in the second sentence of the second paragraph under the heading "Count One" of the "Report Upon the Evidence" appearing at page 7 of the Recommended Decision to the effect that corroding pig lead differs from common pig lead in that the former is desilverized (Com. Ex. 93-G*; Com. Ex. 113; Tr. 1214, 2124).

18. This respondent excepts to the first sentence of the last paragraph beginning on page 7 of the Recommended Decision, which reads as follows:

937 "At one time National produced pig lead, and one of its subsidiaries now produces a limited amount (CX 93)." (Com. Ex. 22-Z-1; Resp. Ex. 173.)

19. This respondent excepts to item "(1-a)", under the heading "National's Acquisitions", on page 8 of the Recommended Decision (Answer of this respondent to amended complaint; Tr. 17-20; Com. Ex. A-Y; Resp. Ex. 179-E).

20. This respondent excepts to item "(1-b)" on page 8 of the Recommended Decision (Com. Exs. 5-B, 22-P et seq.; Resp. Exs. 176 A-B, 180 A-B; Tr. 3300, 3310, 3317-18).

21. This respondent excepts to the statement in item "(1-c)" on page 8 of the Recommended Decision that this

* This is one of the exhibits heretofore objected to by respondents, as to which appeal from the ruling of the Examiner has been reserved by stipulation to the final argument on the merits herein. Any reference herein to such exhibits as to which objections have heretofore been made is not to be deemed a waiver of any objection by any respondent thereto.

respondent acquired Evans Lead Company in "about 1944" (Tr. 1625-26).

22. This respondent excepts to item "(1-d)" on page 9 of the Recommended Decision (Resp. Exs. 153, 175-A, 179-D; Tr. 2891-92, 1071-72, 1625).

23. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that its production of "Dry white lead" from 1936 to 1941 was 30% to 35% upon the ground that this percentage refers only to "dry white lead, basic carbonate" (See Proposed Findings of this respondent, paragraph 6 thereof, and record references therein contained).

24. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision that the percentage of white lead-in-oil produced by this respondent in 1932 "may have gone as high as 70%" (Tr. 1666).

25. This respondent excepts to the chart in item "(1-e)" on page 9 of the Recommended Decision purporting to show the comparative average percentages of production of white lead, dry and in oil, of the respondents and other companies for the years 1938 through 1941 as being inaccurate (Com. Ex. 669).

938 26. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that respondent, Eagle-Picher was a "potential" competitor of this respondent (See Proposed Findings submitted by respondents, The Eagle-Picher Company and the Eagle-Picher Sales Company, and the record references therein contained; Proposed Findings submitted by this respondent, paragraphs 3 to 7, inclusive, thereof, and the record references therein contained).

27. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision purporting to set forth the "combined" production of this respondent and respondent, Eagle-Picher, of white lead, dry and in oil, as being inaccurate and upon the further ground that there is no warrant in the record to "combine" the production of these two respondents.

28. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that the percentage of production of respondent, Eagle-Picher, has been "increased" by the latter's acquisition of respondent International's lead pigment plant "and business" as being unsupported by the record.

29. This respondent excepts to the statement in item

"(1-e)" on page 9 of the Recommended Decision that its prices, terms and conditions of sale were followed generally "by all of its domestic competitors" as being unsupported by the record.

30. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that it became a "predominant" factor in the (lead pigments) industry as being unsupported by the reliable, probative and substantial evidence herein.

31. This respondent excepts to the statement in item "(1-e)" on page 9 of the Recommended Decision to the effect that its competitors "felt compelled" to follow its prices and terms as being unsupported by the record.

939 32. This respondent excepts to the statement in item "(1-e)" appearing at the top of page 10 of the Recommended Decision to the effect that its facilities for production were at all times adequate to satisfy the entire market demand for white lead as erroneous (Tr. 2500) and as unsupported by the reliable, probative and substantial evidence.

33. This respondent excepts to the first paragraph of item "(1-f)" appearing on page 10 of the Recommended Decision insofar as the same fails to include the statements made in paragraph 16 of the Proposed Findings of this respondent (See record references contained in said Proposed Findings, paragraph 16).

34. This respondent excepts to the statements in item "(1-f)" on page 10 of the Recommended Decision which refer to Mr. Charles Simon as "secretary" of this respondent and that he testified "that he did not know that" this respondent ever exercised any control over respondent, Eagle-Picher (Tr. 3304, 3309).

35. This respondent excepts to the second paragraph of item "(1-f)" on page 10 of the Recommended Decision upon the ground that neither the record references therein made nor any other evidence in this proceeding in any way supports the statement there made that "There is some direct evidence, however, of close relations between these two respondents" (referring to this respondent and respondent, Eagle-Picher) (See, e.g., Tr. 1576, 2202).

36. This respondent excepts to the first sentence of item "(2-a)", under the heading "National's Relations With Smelting", on page 11 of the Recommended Decision upon the ground that there is no reliable, probative and substan-

tial evidence to support the statements made in that sentence.

37. This respondent excepts to the statement in the second sentence of item "(2-a)" on page 11 of the Recommended Decision to the effect that American Smelting
940 & Refining Company produced between 30% and 40% of the world supply of refined lead. (This respondent has proposed corrections to Tr. 4093 which, if made, would alter the percentage stated.).

38. This respondent excepts to the last sentence of item "(2-a)" on page 11 of the Recommended Decision as unsupported by the record.

39. This respondent excepts to item "(2-b)" on page 11 of the Recommended Decision (Com. Ex. 93 A-I).

40. This respondent excepts to the first two sentences of item "(2-c)" appearing at the bottom of page 11 and the top of page 12 of the Recommended Decision (Com. Ex. 93 F-G).

41. This respondent excepts to the statement in the first sentence of item "(2-d)" on page 12 of the Recommended Decision to the effect that Hoyt Metal Company was acquired by this respondent as a property of United Lead Company upon the ground that there is no reliable, probative and substantial evidence to support this statement.

42. This respondent excepts to the second sentence of item "(2-d)" on page 12 of the Recommended Decision (Com. Ex. 94 A-G).

43. This respondent excepts to item "(2-e)" on page 12 of the Recommended Decision (Com. Exs. 22 A-Z-47, 93 A-I, 94 A-G, 851 A-B; Resp. Ex. 173; Tr. 1068-69, 1214-17, 3277, 3280, 4084 et seq.).

44. This respondent excepts to the first sentence of item "(2-f)" appearing on page 12 of the Recommended Decision (Resp. Ex. 228; Com. Ex. 113; Tr. 3277, 3280, 4084 et seq.).

45. This respondent excepts to the second sentence of item "(2-f)" appearing at the bottom of page 12 and the top of page 13 of the Recommended Decision (Tr. 4084 et seq.).

46. This respondent excepts to the statement in the third sentence of item "(2-f)" on page 13 of the Rec-
941 ommended Decision to the effect that the chart there quoted represents purchases by this respondent of "common and refined lead" for the years shown (Tr. 3277).

47. This respondent excepts to the last sentence of item "(2-f)" on page 13 of the Recommended Decision as being unsupported by the record references therein made.

48. This respondent excepts to the first sentence of item "(3)", under the heading "National's Relations With du Pont", on page 13 of the Recommended Decision upon the ground that the statements therein made are unsupported by the record.

49. This respondent excepts to the words "direct" and "express" in the fourth sentence of item "(3)" on page 14 of the Recommended Decision as expressing inferences not warranted by the record.

50. This respondent excepts to the fifth, sixth, seventh, eighth and ninth sentences of item "(3)" appearing on page 14 of the Recommended Decision (Com. Exs. 797 K-Z-6, 533, 534, 535, 536, 506 A-F; Tr. 1103).

51. This respondent excepts to the first sentence of item "(4)", under the heading "The Zone Pricing System", appearing on page 14 of the Recommended Decision (Amended Complaint, Paragraph Seven B).

52. This respondent excepts to the second sentence of item "(4)" on page 14 of the Recommended Decision as being unsupported by the record.

53. This respondent excepts to so much of the third sentence of item "(4)" as refers to "identity of method and price" among respondents and to the "price" of pig lead as being the major factor in determining this respondent's prices. (See, e. g., Resp. Exs. 306 A-B, 307 A-B, 308 A-C; Tr. 20.)

942 54. This respondent excepts to the first sentence of item "(4-a)" on page 14 of the Recommended Decision as containing inferences and conclusions unsupported by the record (See Proposed Findings of this respondent, paragraphs 50 to 66, inclusive, thereof, and record references therein contained).

55. This respondent excepts to the second sentence of item "(4-a)" which appears at the bottom of page 14 and the top of page 15 of the Recommended Decision. (See, e. g., Resp. Exs. 165 A-O, 166 A-B, 169 A-N, 170 A-B, 171, 162 A-D, 213 A-Q, 214.)

56. This respondent excepts to the word "plan" in the third sentence of item "(4-a)" on page 15 of the Recommended Decision as being unsupported by the record.

57. This respondent excepts to the outline on page 15 of the Recommended Decision purporting to set forth the

method by which white lead-in-oil and keg products were sold. (See, e. g., Proposed Findings of this respondent, paragraphs 50 to 57, inclusive, thereof, and record references therein made.)

58. This respondent excepts to the paragraph beginning on the fourth line of page 15 of the Recommended Decision beginning with the words "White lead-in-oil and keg products" (Clayton Act, Section 2[a]).

59. This respondent excepts to the paragraph beginning on line 37 of page 15 of the Recommended Decision with the words "Dry white lead and lead sulphate" (Resp. Ex. 159-A; Tr. 1576, 2624, 2625, 3497; Clayton Act, Section 2[a]).

60. This respondent excepts to the entire latter portion of item "(4-a)" beginning with the paragraph at the bottom of page 15 of the Recommended Decision and the words "Dry red lead, litharge and other pigments" and continuing with the remainder of that paragraph on page 16 of the Recommended Decision, and the other paragraphs in said item "(4-a)" on page 16 of the Recommended Decision down to item "(4-b)" on page 16 of the Recommended Decision (See, e. g., Proposed Findings of this respondent, paragraphs 62 to 66, inclusive, thereof, and the record references therein contained; Proposed Findings of this respondent, paragraphs 6 to 11, inclusive, thereof, and the record references therein contained; Clayton Act, Section 2[a]).

943

61. This respondent excepts to all except the first paragraph of item "(4-b)" beginning with the second paragraph of said item at the bottom of page 16 and continuing to the top of page 18 of the Recommended Decision (Record references contained in said item "(4-b)"; Proposed Findings of this respondent, paragraphs 26 to 33, inclusive, thereof, and record references therein contained, paragraphs 50 to 66, inclusive, thereof, and record references therein contained; Reply of this respondent to Proposals Submitted by Counsel for the Commission, page 3 thereof, and record references therein contained).

62. This respondent excepts to item "(4-c)" on page 18 of the Recommended Decision (Com. Exs. 505-A, 517-A, 523; Resp. Exs. 147, 168, 182; Tr. 2916, 3067).

63. This respondent excepts to item "(4-d)" on pages 18 and 19 of the Recommended Decision (Record references contained in said item "(4-d)"; Proposed Findings

of this respondent, paragraphs 50 to 66, inclusive, thereof, and record references therein contained).

64. This respondent excepts to item "(5)", under the heading "Agreement and Price Uniformity Through Particular Practices", appearing on page 19 of the Recommended Decision as being unsupported by the record.

65. This respondent excepts to the first and third sentences of item "(5-a1)" on page 19 of the Recommended Decision (Record references therein contained; Proposed Findings of this respondent, paragraphs 20 and 26 thereof and record references therein contained).

944 66. This respondent excepts to the fourth sentence of item "(5-a1)" appearing at the top of page 20 of the Recommended Decision (Com. Exs., 501 A-D, 508 C, 800 A-C; Tr. 2175).

67. This respondent excepts to the fifth and sixth sentences of item "(5-a1)" appearing on page 20 of the Recommended Decision upon the ground that there is nothing in the record to show that "All respondents" were represented on the Committees during N. R. A. days or that all participated in the various meetings of the Committees.

68. This respondent excepts to the first three sentences of item "(5-a2)" on page 20 of the Recommended Decision (Proposed Findings of this respondent, paragraphs 26 and 27 thereof, and record references therein contained).

69. This respondent excepts to the last sentence of item "(5-a2)" on page 20 of the Recommended Decision as being incomplete (Resp. Exs. 6 A-I, 7 A-C, 8 A-B, 50-O).

70. This respondent excepts to the last sentence of item "(5-a3)" appearing at the top of page 21 of the Recommended Decision insofar as the same may be interpreted as representing the conclusions of the Trial Examiner, as distinguished from those of counsel in support of the amended complaint, upon the ground that said conclusions find no support in the record.

71. This respondent excepts to the second sentence of item "(5-a4)" on page 21 of the Recommended Decision insofar as the same implies that evidence to the effect stated was found only in the parol testimony of Wormser and others (Com. Exs. 501 A-D, 502 A-C, 504-A-B 505 A-B, 799, 800 A-C, 801 A-B, 802 A-B, 803, 805 A-C; Resp. Exs. 83 A-Z-3, 85 A-Z-13, 134 A-E, 135 A-B, 136 A-B, 137 A-B, 138 A-B).

72. This respondent excepts to the first sentence of item "(5-a5)" on page 21 of the Recommended De-
945 cision insofar as the same implies that there is any proof in the record of "agreements" as to the matters therein referred to, upon the ground that there is no proof in the record of any such "agreements." (See also, Com. Ex. 505-A.)

73. This respondent excepts to the second sentence of item "(5-a5)" on page 21 of the Recommended Decision upon the ground that the same is unsupported by the record.

74. This respondent excepts to the third sentence of item "(5-a5)" appearing on page 21 of the Recommended Decision upon the ground that the same is an incomplete summary of the record references therein made.

75. This respondent excepts to the words "except during the period covered by the Code" in the fifth sentence of item "(5-a6)" appearing on the top of page 22 of the Recommended Decision as being an inaccurate summary of the testimony referred to (Tr. 2353-55).

76. This respondent excepts to the second paragraph of item "(5-a6)" appearing on page 22 of the Recommended Decision as unsupported by the record.

77. This respondent excepts to the first two sentences of item "(5-b1)", under the heading "Consignment or 'Agency' Agreements", on page 22 of the Recommended Decision (Tr. 2905-07; Com. Exs. 506-D, 595, 613 A-C, 706 B-D, 712 A).

78. This respondent excepts to the first two sentences of item "(5-b2)" on page 22 of the Recommended Decision (Com. Ex. 501-A; Tr. 2160).

79. This respondent excepts to the last sentence of item "(5-b2)" on page 23 of the Recommended Decision insofar as the same implies there were "Agreements to employ a uniform consignment plan", upon the ground that the implication is not supported by the record.

946 80. This respondent excepts to item "(5-b3)" on pages 23 and 24 of the Recommended Decision (Com. Exs. 613 A-C, 626, 629 A-C, 506-E, 752 A-Z-144; Tr. 638).

81. This respondent excepts to item "(5-b4)" on page 24 of the Recommended Decision upon the ground that the same is incomplete (Com. Exs. 506-D, 706-F; *United States* v. *General Electric Co.*, 272 U. S. 476; *Fed. Trade Comm.* v. *Curtis Co.*, 260 U. S. 568, 581).

82. This respondent excepts to the second sentence of

item "(5-b5)" on page 24 of the Recommended Decision (Com. Ex. 576).

83. This respondent excepts to the third sentence of item "(5-b5)" on page 24 of the Recommended Decision upon the ground that the same is unsupported by the record.

84. This respondent excepts to the fourth sentence of item "(5-b5)" on page 24 of the Recommended Decision upon the ground that the record contains no reliable probative and substantial evidence in support thereof.

85. This respondent excepts to the first two sentences of the second paragraph of item "(5-b5)" appearing at the bottom of page 24 of the Recommended Decision (Com. Ex. 836-E; Tr. 3535).

86. This respondent excepts to so much of the third sentence of the third paragraph of item "(5-b5)" on page 25 of the Recommended Decision as refers to "consignees" and "dealer" of this respondent and respondent, Eagle-Picher (Com. Exs. 613 A-C, 629 A-C).

87. This respondent excepts to item "(5-b6)", under the heading "Recommended Resale Prices", on pages 25 and 26 of the Recommended Decision (Record references therein made; Com. Exs. 656 A-B, 659 A, B, Q through Z-51; Resp. Exs. 229 through 305-D, inclusive; Tr. 2502-03, 3514-15, 2995).

947 88. This respondent excepts to item "(5-c1)", under the heading "Uniform Quotations", on pages 26 and 27 of the Recommended Decision upon the ground that neither the record references therein made nor any other portion of the record supports the statements there made.

89. This respondent excepts to the first sentence of item "(5-c2)" on page 27 of the Recommended Decision as containing inferences unwarranted by the record (Com. Ex. 504-B).

90. This respondent excepts to so much of the second sentence of item "(5-c2)" on page 27 of the Recommended Decision as implies that it put Article "II" of the Supplementary Code as finally adopted into effect some months prior to its formal adoption (Compare Tr. 4077 with Schedule A, Article III of Com. Ex. 809).

91. This respondent excepts to the third, fourth and fifth sentences of item "(5-c2)" on page 27 of the Recommended Decision (Record references therein made; Proposed Findings of this respondent, paragraphs 81 and 82, thereof, and record references therein made).

92. This respondent excepts to the entire second paragraph of item "(5-c2)" appearing on pages 27 and 28 of the Recommended Decision upon the ground that neither the record references therein made nor any other portion of the record supports the statements there made.

93. This respondent excepts to all except the first sentence of item "(5-c3)" on page 28 of the Recommended Decision (Record references therein contained; Tr. 1067, 3666-67; Resp. Exs. 299 through 305-D).

94. This respondent excepts to the first sentence of item "(5-c4)" on page 28 of the Recommended Decision as containing inferences unwarranted by the record.

948 95. This respondent excepts to the statement in the fourth sentence of item "(5-c4)" on page 28 of the Recommended Decision that "sometimes it [Glidden] charged dealers 5¢ more per 100 lbs. than National and others charged". (Com. Exs. 662-Z-17-Z-18, 663-H, 659-Z-28).

96. This respondent excepts to the tenth and eleventh sentences of item "(5-c4)" which appear on page 29 of the Recommended Decision as being unsupported by the record.

97. This respondent excepts to all of item "(5-c5)" that appears on page 29 of the Recommended Decision (Record references therein made; see also, exception 87, above, and record references there made).

98. This respondent excepts to the first sentence appearing on page 30 of the Recommended Decision (which sentence is a part of item "[5-c5]") and to the last sentence of said item "(5-c5)" as being unsupported by the record.

99. This respondent excepts to the statement in the next to the last sentence of item "(5-c5)" on page 30 of the Recommended Decision to the effect that its "quotations" and those of respondent, Eagle-Picher, were "identical" in the periods referred to as being unsupported by and contrary to the record (See, e. g., Tr. 4095-96; Resp. Exs. 306 A-B, 307 A-B, 308 A-C).

100. This respondent excepts to item "(5-c6)", under the heading "Uniform Sales Prices", which appears on pages 30 to 32, inclusive, of the Recommended Decision in its entirety (Record references therein made; Tr. 638; Com. Exs. 613 A-C, 629 A-C; *United States* v. *General Electric Co.*, 272 U. S. 476; *Fed. Trade Comm.* v. *Curtis Co.*, 260 U. S. 568, 581).

101. This respondent excepts to item "(5-c7)" on page

33 of the Recommended Decision (see exception 98, above, and record references and authorities there cited).

102. This respondent excepts to item "(5-c8)" on page 33 of the Recommended Decision as being unsupported by the record.

949 103. This respondent excepts to item "(5-c9)" on page 33 of the Recommended Decision as being unsupported by the record.

104. This respondent excepts to item "(5-c10)" on pages 33 and 34 of the Recommended Decision as being unsupported by either the record references there made or other portions of the record.

105. This respondent excepts to item "(5-c11)", under the heading "Uniform Bidding", on page 34 of the Recommended Decision as being unsupported by the record and the record references therein made.

106. This respondent excepts to all of item "(5-d)", under the heading "Container Differentials", as appears on page 34 of the Recommended Decision (Com. Ex. 800 A-C).

107. This respondent excepts to that portion of item "(5-d)" which appears on page 35 of the Recommended Decision, beginning with the first word of said page and continuing through the word "deviation" on the ninth line of said page, as being unsupported by the record (See, e. g., Com. Ex. 659 Q-V; Answers of all respondents to Amended Complaint).

108. This respondent excepts to the fourth sentence of item "(5-e)", under the heading "Quarterly Contracts", on page 35 of the Recommended Decision (Tr. 1658-60, 3080).

109. This respondent excepts to the last three sentences of item "(5-e)" on page 35 of the Recommended Decision as unsupported by the record.

110. This respondent excepts to the first three sentences of item "(5-f)", under the heading "Red Lead Differentials", on page 36 of the Recommended Decision as unsupported by the record.

111. This respondent excepts to item "(6-a)", under the heading "Evidence of Effects", on page 36 of the
950 Recommended Decision as unsupported by either the record references therein made or any other portion of the record.

112. This respondent excepts to the sixth sentence of

item "(6-b)" which appears as the last sentence on page 36 of the Recommended Decision as being hypothetical and not supported by the record.

113. This respondent excepts to a portion of the ninth sentence of item "(6-b)" on page 37 of the Recommended Decision, beginning with the word "but" on the seventh line of said page and continuing for the rest of that sentence, as being unsupported by the record.

114. This respondent excepts to the first three sentences of item "(6-d)" beginning on page 37 and extending to the second line of page 38 of the Recommended Decision and to the second paragraph of said item on page 38 of the Recommended Decision as being unsupported by the record.

115. This respondent excepts to the use of the word "system" ir item "(6-d)" which appears on the fourth line of page 38 of the Recommended Decision upon the ground that it suggests inferences and conclusions unsupported by the record.

116. This respondent excepts to items "(7-a1)", "(7-a2)", "(7-a3)", "(7-a4)", "(7-a5)", "(7-a6)", "(7-a7)", "(7-a8)" and "(7-a9)", all under the heading "Conclusions on Acquisitions and Methods", on pages 38, 39 and 40 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

117. This respondent excepts to item "(7-b1)" appearing under the heading "Conclusions as to Agreements" on pages 40 and 41 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

951 118. This respondent excepts to item "(7-b2)" on pages 41 and 42 of the Recommended Decision, except for the second sentence thereof appearing on page 41 of the Recommended Decision, as containing statements, inferences and insinuations unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

119. This respondent excepts to item "(7-b3)" on page 42 of the Recommended Decision, except for the statements therein made that respondent, Glidden, used shipping points from which customers paid the freight and made prices substantially different from those of this respondent, that respondent, Glidden, did not use any consignment plan

until six years after the adoption of the agency plan by this respondent, and that respondent Glidden's use thereof was short-lived and according to its own individual method, that Glidden produced evidence showing the existence of no agreement and showing the practicability of securing its competitors' quotations promptly and the necessity of meeting them in such manner as would enable it to do business and make as large a profit margin as possible, and that respondent, Glidden, gave active competition, upon the ground that the portions of such item excepted to contain statements, inferences and insinuations either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

120. This respondent excepts to item "(7-b4)" on pages 42 and 43 of the Recommended Decision, except for the statement that respondent, Sherwin-Williams, did not use any consignment method, upon the ground that said item contains statements, inferences and insinuations either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

121. This respondent excepts to item "(7-c1)", under the heading "Conclusions as to Effects", on page 43 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

952 122. This respondent excepts to the first, second and last sentences of item "(7-c2)" on page 43 of the Recommended Decision as either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

123. This respondent excepts to item "(7-c3)" on pages 43 and 44 of the Recommended Decision insofar as the same may be deemed to differ from item "(11-c)" on pages 58 to 60, inclusive, of the Recommended Decision (except for the words therein specifically exeepted to hereinafter), and insofar as said item "(7-3c)" may be said to imply that a near-mill customer would receive any benefit through f.o.b. mill pricing, under the circumstances disclosed by this record, for the reasons set forth in said item "(11-c)".

124. This respondent excepts to items "(7-c4)" and "(7-c5)" on page 44 of the Recommended Decision as being either unsupported by the evidence or directly contrary to the reliable, probative and substantial evidence herein.

125. This respondent excepts to item "(7-d1)", under the heading "Conclusions of Law", on pages 44 and 45 of the Recommended Decision (Resp. Exs. 6 through 8, inclusive. See also: National Industrial Recovery Act, Section 5, 48 Stat. 195, 198; *Eugene Dietzgen Co.* v. *Federal Trade Com'n*, 142 F. 2d 321, 329; *Aetna Portland Cement Co.* v. *Federal Trade Com'n*, 157 F. 2d 533, 549, rev'd on other grounds, ... U. S. .....).

126. This respondent excepts to item "(7-d2)" on page 45 of the Recommended Decision (See, e. g.: *Sugar Institute* v. *United States*, 297 U. S. 553; *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 588; *Maple Flooring Assn.* v. *United States*, 268 U. S. 563; *Aetna Portland Cement Co.* v. *Federal Trade Com'n, supra; United States* v. *General Electric Co.*, 272 U. S. 476; *Fed. Trade Comm.* v. *Curtis Co.*, 260 U. S. 568, 581; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-199; *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil of N. J.*, 47 F. 2d 288; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344).

953 127. This respondent excepts to item "(7-d3)" on page 45 of the Recommended Decision as being unsupported by and contrary to the record and upon the further ground that the matters referred to in said item are not within the jurisdiction of the Federal Trade Commission as set forth in the Federal Trade Commission Act. (In addition, see: *U. S.* v. *U. S. Steel Corporation*, 223 Fed. 55, 251 U. S. 417; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 424.)

128. This respondent excepts to items "(7-d4)", "(7-d5)" and "(7-d6)" on pages 45 and 46 of the Recommended Decision as being unsupported by and contrary to the record and the Federal Trade Commission Act. (See authorities cited supra.)

129. This respondent excepts to the third paragraph under the heading "Count Two" on page 46 of the Recommended Decision, insofar as the same incorporates the items set forth in the "Report Upon the Evidence" at pages 7-46 of the Recommended Decision, in the same manner as hereinabove set out in exceptions 15 through 128 hereinabove.

130. This respondent excepts to item "(8-a1)" on pages 46 and 47 of the Recommended Decision as unwarranted

by the facts or the law. (See Clayton Act, Section 2[a]; *Trade Commission* v. *Staley*, 324 U. S. 746; *Corn Products Co.* v. *Comm'n.*, 324 U. S. 726.)

131. This respondent excepts to item "(8-a2)" on pages 47, 48, and 49 of the Recommended Decision (Record references therein made; Tr. 442-60, 529-30. See also, authorities cited in exception 130 above.)

132. This respondent excepts to all except the last sentence of item "(8-a3)" on page 49 of the Recommended Decision as unsupported by either the record references therein made or any other portion of the record.

133. This respondent excepts to item "(8-a4)" on pages 49 and 50 of the Recommended Decision as unsupported by either the record references therein made or any other portion of the record.

954 134. This respondent excepts to items "(9)" and "(9-a)", under the heading "Discriminations Through Differentials", on page 50 of the Recommended Decision as being unsupported by the record). (See, also, exception 81, above, and record references and authorities there cited.)

135. This respondent excepts to the first and last sentences of item "(9-b)" on page 50 of the Recommended Decision as containing statements and inferences not warranted by the record.

136. This respondent excepts to the first sentence of item "(9-c)" on page 51 of the Recommended Decision as unsupported by the record.

137. This respondent excepts to item "(9-d)" on pages 51 and 52 of the Recommended Decision as unsupported by the record.

138. This respondent excepts to the first sentence of item "(9-e)" on page 52 of the Recommended Decision as unsupported by the record.

139. This respondent excepts to the entire second paragraph of item "(9-e)" on page 52 of the Recommended Decision and the first two sentences on page 53 of the Recommended Decision as unsupported by the record references therein made (Tr. 442-60, 529-30).

140. This respondent excepts to the statement in the fourth sentence on page 53 of the Recommended Decision, which sentence is a part of item "(9-e)", to the effect that Resp. Exs. 215-A-B and 216 were studies based on sales from this respondent's "Atlantic branch", as contrary to the evidence. (Tr. 4051 et seq.).

141. This respondent excepts to the statement in the fifth sentence on page 53 of the Recommended Decision, which sentence is a part of item "(9-e)" to the effect that in respondents' study the difference in average sales and freight costs between carload and less-than-carload shipments of dry white lead was "about ½¢ per lb.", as being inaccurate (Resp. Ex. 216).

955 142. This respondent excepts to the first and last sentences of item "(9-f)" on page 53 of the Recommended Decision as unsupported by the record.

143. This respondent excepts to item "(10-a)", under the heading "Effects of Discriminations", on page 53 of the Recommended Decision as unsupported by the record.

144. This respondent excepts to the first two sentences of item "(10-b)" at the bottom of page 53 and the top of page 54 of the Recommended Decision as unsupported by the record. (See, e. g., Tr. 1717, 1796-97, 1876.)

145. This respondent excepts to the entire latter portion of item "(10-b)", beginning with the third sentence thereof, on page 54 of the Recommended Decision as being an inaccurate summary of the testimony and the record references therein cited.

146. This respondent excepts to item "(10-c)" on page 54 of the Recommended Decision in its entirety as containing statements contrary to the evidence in some instances, misquotation of the testimony, and incomplete statements of the evidence (Record references therein made; see also: Tr. 1411-12, 1422, 1441-1473).

147. This respondent excepts to the first, third, fourth, fifth, sixth and last sentences of item "(10-d)" on page 55 of the Recommended Decision as unsupported by the record.

148. This respondent excepts to the second sentence of item "(10-d)" on page 55 of the Recommended Decision upon the ground that the uncontradicted evidence establishes that the differential between carload and less-than-carload shipments of dry white lead, basic carbonate, was less than the difference in the respective costs of sale and delivery of the two quantities (Tr. 4050-65; Resp. Exs. 215 A-B, 216, 217; see, also, item "[10-k]" on page 57 of the Recommended Decision).

956 149. This respondent excepts to the first sentence of item "(10-e)" on page 55 of the Recommended Decision as unsupported by the record (See, e. g., Resp. Ex. 217).

150. This respondent excepts to the second sentence of item "(10-e)" on page 55 of the Recommended Decision as supported by the record.

151. This respondent excepts to the last two sentences of item "(10-e)" on page 55 of the Recommended Decision upon the ground that the record establishes that there were no discriminations in prices within the meaning of Section 2(a) of the Clayton Act arising out of or in connection with the territorial differential method of selling lead pigments as employed by this respondent (*Trade Commission* v. *Staley Co.*, 324 U. S. 746; see, e. g.: Tr. 3966; Resp. Exs. 165 A-O, 166 A-B, 169 A-N, 170 A-B, 171, 162 A-D, 213 A-Q, 214).

152. This respondent excepts to item "(10-f)" on page 55 of the Recommended Decision, except for the last six words which read "and not from discriminations per se", as unsupported by the record.

153. This respondent excepts to the words in the first sentence of item "(10-g)" on page 56 of the Recommended Decision, under the heading "Conclusions and Reasons", which read "average freight increment latent", to the third sentence of said item, and to the words in the last sentence of said item which read "In the absence of excessive freight factors which would produce higher prices to the public and substantial economic disparities between customers", as unwarranted by the facts in this case or by the law (Clayton Act, Section 2[a]; Senate Committee Report No. 1502, dated February 3, 1936; *Corn Products Co.* v. *Comm'n*, 324 U. S. 726; *Trade Commission* v. *Staley Co.*, 324 U. S. 746).

154. This respondent excepts to the second clause of the second sentence of item "(10-h)" on page 56 of the Recommended Decision, beginning with the words "and are justified", and to the remainder of said item, as being unsupported by the record.

957 155. This respondent excepts to item "(10-j)" on page 57 of the Recommended Decision as being unsupported by the record.

156. This respondent excepts to the word "all" in the first line of item "(10-k)" on page 57 of the Recommended Decision as unsupported by the record.

157. This respondent excepts to the first sentence of item "(10-l)" on page 57 of the Recommended Decision as unsupported by the record (See, e. g., Resp. Ex. 217).

158. This respondent excepts to the word "discrimina-

tions" in the first line of item "(10-m)" on page 57 of the Recommended Decision as unsupported by the record.

159. This respondent excepts to the last two sentences of item "(10-m)" on page 57 of the Recommended Decision insofar as the same purport to state that there were any discriminations or discriminatory practices of any respondent in this proceeding or that the methods referred to were employed "co-operatively" or "collusively" by any of the respondents, upon the ground that said statements are unsupported by and directly contrary to the record.

160. This respondent excepts to items "(11-a)" and "(11-b)", under the heading "Conclusions of Law", on pages 57 and 58 of the Recommended Decision as unsupported by the record and contrary to law (Clayton Act, Section 2[a]).

161. This respondent excepts to the following words which are found in the third paragraph of item "(11-c)" and which appear as part of the sixth sentence of the second paragraph on page 59 of the Recommended Decision: "The Federal Trade Commission Act, based on the policy underlying the Sherman Act, seeks to enhance competition and produce differing prices, * * *", upon the ground that this statement finds no warrant in the law (See *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, 451; *Swift & Co.* v. *U. S.*, 196 U. S. 375, 400; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-99; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil Co. of New Jersey*, 47 F. [2d] 288; *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 605).

162. This respondent excepts to the words in the seventh sentence in the third paragraph of item "(11-c)" (which appears as the second paragraph on page 59 of the Recommended Decision) which read "in the absence of uneconomic or unlawful factors" as being unwarranted by the law (Clayton Act, Section 2[a]; *Trade Commission* v. *Staley Co., supra;* Senate Committee Report No. 1502, dated February 3, 1936).

Exceptions to Section IV of the Recommended Decision, entitled "Recommended Findings and Conclusions":

163. This respondent excepts to the statement in the second sentence of the first paragraph of Paragraph 1-F on page 62 of the Recommended Decision to the effect that corroding pig lead differs from common pig lead in that the former is desilverized, for the same reasons as are set forth in exception 17 hereinabove.

164. This respondent excepts to the statement in the fifth sentence of the second paragraph of Paragraph 1-F on page 62 of the Recommended Decision to the effect that the respondents herein produce practically all but a small quantity of the lead pigments produced and sold in the United States, upon the ground that the statement finds no support in the evidence.

165. This respondent excepts to the first sentence of Paragraph 1-H on page 62 of the Recommended Decision as being unsupported by the record.

166. This respondent excepts to the second, third and fourth sentences of Paragraph 1-H on pages 62 and 63 of the Recommended Decision, for the same reasons as are set forth in exception 20 hereinabove.

959 167. This respondent excepts to the statement in the last sentence of Paragraph 1-H on page 63 of the Recommended Decision to the effect that this respondent acquired Evans Lead Company in "about 1944", for the same reasons as are set forth in exception 21 hereinabove.

168. This respondent excepts to Paragraph 1-I on page 63 of the Recommended Decision, for the same reasons as are set forth in exception 22 hereinabove.

169. This respondent excepts to the statements contained in Paragraph 1-J on pages 63 and 64 of the Recommended Decision to the effect that its dry white lead production was from 30% to 35%, that in 1932 its production of white lead in oil might have gone as high as 70%, that the percentages were as set forth in the tabulation at the top of page 64, that Eagle-Picher was a "potential competitor" of this respondent, that the "combined production" of this respondent and Eagle-Picher was as stated, that the percentage of Eagle-Picher has been increased by its acquisition of International's lead pigment plant and business, and to the first, second and last sentences of the last paragraph of said Paragraph 1-J, for the same reasons as are set forth in exceptions 23 through 32, inclusive, hereinabove.

170. This respondent excepts to Paragraph 1-K on page 64 of the Recommended Decision, for the same reasons as are set forth in exceptions 33 and 35 hereinabove.

171. This respondent excepts to the first, second and last sentences of Paragraph 2-A on page 65 of the Recommended Decision, for the same reasons as are set forth in exceptions 36, 37 and 38 hereinabove.

172. This respondent excepts to Paragraph 2-B on page

65 of the Recommended Decision, for the same reasons as are set forth in exception 39 hereinabove.

960 173. This respondent excepts to the first two sentences of Paragraph 2-C on page 65 of the Recommended Decision, for the same reasons as are set forth in exception 40 hereinabove.

174. This respondent excepts to all except the last sentence of Paragraph 2-D on page 66 of the Recommended Decision, for the same reasons as are set forth in exceptions 41 and 42 hereinabove.

175. This respondent excepts to Paragraph 2-E on page 66 of the Recommended Decision, for the same reasons as are set forth in exception 43 hereinabove.

176. This respondent excepts to Paragraph 2-F on page 66 of the Recommended Decision, for the same reasons as are set forth in exceptions 44 and 45 hereinabove.

177. This respondent excepts to the first sentence of Paragraph 3 on page 67 of the Recommended Decision, for the same reasons as are set forth in exception 48 hereinabove.

178. This respondent excepts to the words "direct" and "express" in the fourth sentence of Paragraph 3 on page 67 of the Recommended Decision, for the same reasons as are set forth in exception 49 hereinabove.

179. This respondent excepts to the fifth, sixth, seventh, eighth and ninth sentences of Paragraph 3 on page 67 of the Recommended Decisions, for the same reasons as are set forth in exception 50 hereinabove.

180. This respondent excepts to Paragraph 4-A on pages 67 and 68 of the Recommended Decision, for the same reasons as are set forth in exceptions 54, 55, 57, 58, 59 and 60 hereinabove.

181. This respondent excepts to Paragraph 4-B on page 68 of the Recommended Decision, for the same reasons as are set forth in exception 61 hereinabove.

961 182. This respondent excepts to Paragraph 4-C on pages 68 and 69 of the Recommended Decision, for the same reasons as are set forth in exception 62 hereinabove.

183. This respondent excepts to Paragraph 4-D on page 69 of the Recommended Decision for the same reasons as are set forth in exception 63 hereinabove.

184. This respondent excepts to the first, third, fourth, fifth and sixth sentences of Paragraph 5-A1 on page 69 of

the Recommended Decision, for the same reasons as are set forth in exceptions 65, 66 and 67 hereinabove.

185. This respondent excepts to Paragraph 5-A2 on page 70 of the Recommended Decision, for the same reasons as are set forth in exceptions 68 and 69 hereinabove.

186. This respondent excepts to Paragraph 5-A3 on page 70 of the Recommended Decision, for the same reasons as are set forth in exceptions 72, 73 and 74 hereinabove.

187. This respondent excepts to the first two sentences of Paragraph 5-B1 on page 71 of the Recommended Decision, for the same reasons ase are set forth in exception 77 hereinabove.

188. This respondent excepts to the first and last sentences of Paragraph 5-B2, on page 71 of Recommended Decision, for the same reasons as are set forth in exceptions 78 and 79 hereinabove.

189. This respondent excepts to Paragraph 5-B3 on pages 71 and 72 of the Recommended Decision, for the same reasons as are set forth in exception 80 hereinabove.

190. This respondent excepts to Paragraph 5-B4 on page 72 of the Recommended Decision, for the same reasons as are set forth in exception 81 hereinabove.

962 191. This respondent excepts to the second, third and fourth sentences of the first paragraph of Paragraph 5-B5 on pages 72 and 73 of the Recommended Decision, to the first two sentences of the second paragraph of said Paragraph 5-B5 on page 73 of the Recommended Decision, and to the words "consignees" and "dealer" appearing in the third sentence of the third paragraph of said Paragraph 5-B5 on page 73 of the Recommended Decision, for the same reasons as are set forth in exceptions 82 through 86, inclusive, hereinabove.

192. This respondent excepts to Paragraph 5-B6 on page 73 of the Recommended Decision, for the same reasons as are set forth in exception 87 hereinabove.

193. This respondent excepts to Paragraph 5-C1 on page 74 of the Recommended Decision, for the same reasons as are set forth in exception 88 hereinabove.

194. This respondent excepts to the first sentence of the first paragraph of Paragraph 5-C2, to that portion of the second sentence of said Paragraph 5-C2 which states that National put Article "II" of the supplementary code into operation some months prior to its formal adoption,

and to the third, fourth and last sentences of the first paragraph of said Paragraph 5-C2 on page 74 of the Recommended Decision, and to all of the second paragraph of said Paragraph 5-C2 on page 75 of the Recommended Decision, for the same reasons as are set forth in exceptions 89 through 92, inclusive, hereinabove.

195. This respondent excepts to all except the first sentence of Paragraph 5-C3 on page 75 of the Recommended Decision, for the same reasons as are set forth in exception 93 hereinabove.

196. This respondent excepts to the first sentence of Paragraph 5-C4, to the statement in the third sentence of said Paragraph 5-C4 which states that sometimes respondent, Glidden, charged dealers 5¢ more per 100 lbs. than
963 this respondent and others, and to the last sentence of said Paragraph 5-C4 on pages 75 and 76 of the Recommended Decision, for the same reasons as are set forth in exceptions 94, 95 and 96 hereinabove.

197. This respondent excepts to the first paragraph of Paragraph 5-C5 and to the first and last sentences of the second paragraph of said Paragraph 5-C5 on page 76 of the Recommended Decision, for the same reasons as are set forth in exceptions 97 and 98 hereinabove.

198. This respondent excepts to Paragraph 5-C6, Paragraph 5-C7, Paragraph 5-C8, Paragraph 5-C9, Paragraph 5-C10, and Paragraph 5-C11, on pages 76, 77 and 78 of the Recommended Decision, for the same reasons as are set forth in exceptions 100 through 105, inclusive, hereinabove.

199. This respondent excepts to the first, second, third and fourth sentences, and to the first portion of the fifth sentence of Paragraph 5-D on page 78 of the Recommended Decision, down to but not including the words "and it was shown", for the same reasons as are set forth in exceptions 106 and 107 hereinabove.

200. This respondent excepts to the omission from the end of the last sentence of Paragraph 5-E on page 79 of the Recommended Decision of the words "or used generally" as set forth in the third sentence of item "(5-e)" on page 35 of the Recommended Decision.

201. This respondent excepts to the first three sentences of Paragraph 5-F on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 110 hereinabove.

202. This respondent excepts to Paragraph 6-A on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 111 hereinabove.

203. This respondent excepts to the third sentence of the first paragraph of Paragraph 6-B on page 79 of the Recommended Decision, for the same reasons as are set forth in exception 112 hereinabove.

964 204. This respondent excepts to that portion of the last sentence of the second paragraph of Paragraph 6-B on page 80 of the Recommended Decision, beginning with the word "but" on the seventh line of said page and continuing throughout the rest of said paragraph, for the same reasons as are set forth in exception 113 hereinabove.

205. This respondent excepts to Paragraph 6-D on page 80 of the Recommended Decision, for the same reasons as are set forth in exception 114 hereinabove.

206. This respondent excepts to Paragraph 7-A1, Paragraph 7-A2, Paragraph 7-A3, Paragraph 7-A4, Paragraph 7-A5, Paragraph 7-A6, Paragraph 7-A7 and Paragraph 7-A8 on pages 80, 81 and 82 of the Recommended Decision, for the same reasons as are set forth in exception 116 hereinabove.

207. This respondent excepts to Paragraph 7-B1 on pages 82 and 83 of the Recommended Decision, for the same reasons as are set forth in exception 117 hereinabove.

208. This respondent excepts to Paragraph 7-B2 on page 83 of the Recommended Decision, for the same reasons as are set forth in exception 118 hereinabove.

209. This respondent excepts to Paragraph 7-B3 on pages 83 and 84 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 119 hereinabove.

210. This respondent excepts to Paragraph 7-B4 on page 84 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 120 hereinabove.

211. This respondent excepts to Paragraph 7-C1 on page 84 of the Recommended Decision, for the same reasons as are set forth in exception 121 hereinabove.

965 212. This respondent excepts to the first two sentences of Paragraph 7-C2 on page 84 of the Recommended Decision and to the last sentence of said Paragraph 7-C2 on page 85 of the Recommended Decision, for

the same reasons as are set forth in exception 122 hereinabove.

213. This respondent excepts to Paragraph 7-C3, Paragraph 7-C4 and Paragraph 7-C5 on page 85 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exceptions 123 and 124 hereinabove.

214. This respondent excepts to Paragraph 7-D1, Paragraph 7-D2, Paragraph 7-D3, Paragraph 7-D4, Paragraph 7-D5 and Paragraph 7-D6 on pages 85, 86 and 87 of the Recommended Decision, for the same reasons as are set forth in exceptions 125 through 128, inclusive, hereinabove.

215. This respondent excepts to the third paragraph of Paragraph 8-A on page 87 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exception 129 hereinabove.

216. This respondent excepts to Paragraph 8-A1 and Paragraph 8-A2 on page 88 of the Recommended Decision, for the same reasons as are set forth in exceptions 130 and 131 hereinabove.

217. This respondent excepts to all except the last sentence of Paragraph 8-A3 on pages 88 and 89 of the Recommended Decision, for the same reasons as are set forth in exception 132 hereinabove.

218. This respondent excepts to Paragraph 8-A4 and Paragraph 9-A on pages 89 and 90 of the Recommended Decision, for the same reasons as are set forth in exceptions 133 and 134 hereinabove.

219. This respondent excepts to the first and last sentences of Paragraph 9-B on page 90 of the Recommended Decision, for the same reasons as are set forth in exception 135 hereinabove.

966 220. This respondent excepts to the first sentence of Paragraph 9-C on page 90 of the Recommended Decision, for the same reasons as are set forth in exception 136 hereinabove.

221. This respondent excepts to Paragraph 9-D on pages 90 and 91 of the Recommended Decision, for the same reasons as are set forth in exception 137 hereinabove.

222. This respondent excepts to the first sentence of the first paragraph and to all of the second paragraph of Paragraph 9-E on page 91 of the Recommended Decision,

for the same reasons as are set forth in exceptions 138 and 139 hereinabove.

223. This respondent excepts to the first and last sentences of Paragraph 9-F on page 91 of the Recommended Decision, for the same reasons as are set forth in exception 142 hereinabove.

224. This respondent excepts to Paragraph 10-A, Paragraph 10-B and Paragraph 10-C on pages 91 and 92 of the Recommended Decision, for the same reasons as are set forth in exceptions 143 through 146, inclusive, hereinabove.

225. This respondent excepts to all except the seventh sentence in Paragraph 10-D on pages 92 and 93 of the Recommended Decision, for the same reasons as are set forth in exceptions 147 and 148 hereinabove.

226. This respondent excepts to Paragraph 10-E on page 93 of the Recommended Decision, in the same manner and for the same reasons as are set forth in exceptions 149, 150 and 151 hereinabove.

227. This respondent excepts to all of Paragraph 10-F on page 93 of the Recommended Decision, except the last six words thereof which read "and not from discriminations per se", for the same reasons as are set forth in exception 152 hereinabove.

967 228. This respondent excepts to the words in the first sentence of Paragraph 10-G on page 93 of the Recommended Decision which read "average freight increments latent", and to the third sentence of said Paragraph 10-G, for the same reasons as are set forth in exception 153 hereinabove.

229. This respondent excepts to the second clause of the second sentence of Paragraph 10-H on page 94 of the Recommended Decision, beginning with the words "and are justified", and to the remainder of said paragraph, for the same reasons as are set forth in exception 154 hereinabove.

230. This respondent excepts to Paragraph 10-J on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 155 hereinabove.

231. This respondent excepts to the word "all" in the first line of Paragraph 10-K on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 156 hereinabove.

232. This respondent excepts to the first sentence of

Paragraph 10-L on page 94 of the Recommended Decision, for the same reasons as are set forth in exception 157 hereinabove.

233. This respondent excepts to Paragraph 11-A and Paragraph 11-B on page 95 of the Recommended Decision, for the same reasons as are set forth in exception 160 hereinabove.

Exceptions to Section V of the Recommended Decision, entitled "Recommended Order":

234. This respondent excepts to the preamble and paragraphs "1" and "2" and sub-paragraphs thereof of the "Recommended Order" on pages 96 and 97 of the Recommended Decision as unwarranted by the evidence herein or by the Federal Trade Commission Act or the Clayton Act.

968 235. This respondent excepts to paragraph "3" of the "Recommended Order" on page 98 of the Recommended Decision as unwarranted by the record herein or the Federal Trade Commission Act and "as unreasonably restrictive and beyond the scope of the Commission's authority" in accordance with the Trial Examiner's Rulings on Proposals submitted by counsel in support of the amended complaint (see Trial Examiner's Rulings on Proposals for Findings and Conclusions Submitted by Counsel, page 8).

236. This respondent excepts to paragraph "4" of the "Recommended Order" on page 98 of the Recommended Decision as unwarranted by the record herein, or by the Clayton Act.

237. This respondent excepts to paragraph "5" of the "Recommended Order" on pages 98 and 99 of the Recommended Decision as unwarranted by the record herein or by the Federal Trade Commission Act or the Clayton Act. Exceptions to the Trial Examiner's failure to find in accordance with Proposals for Findings and Conclusions submitted by this respondent, and as set forth in the Trial Examiner's Rulings on Proposals for Findings and Conclusions Submitted by Counsel, heretofore filed:

238. This respondent excepts to the failure of the Trial Examiner to find in haec verba as requested in paragraphs 1 through 10, inclusive, and 26 of the Proposed Findings submitted by this respondent and to the Trial Examiner's failure to rule upon, and to find as requested in, paragraphs 29, 50, and 64 of the Proposed Findings submitted by this respondent.

239. This respondent excepts to the Trial Examiner's denial of the findings requested in paragraphs 13 through 19, inclusive, 24, 27, 34 through 42, inclusive, 44, 48, 49, 51, 52, 56, 57, 60 through 63, inclusive, 65 through 68, inclusive, 71, 76, 80, 84, 85, 86, 88 through 97, inclusive, 102 through 108, inclusive, of the Proposed Findings submitted by this respondent.

969 240. This respondent excepts to the denial of the Conclusions of Law requested by this respondent in its proposals and numbered 1 through 8, inclusive.

In addition, this respondent adopts as its own and incorporates herein by reference the exceptions taken by each other respondent herein to the Recommended Decision of the Trial Examiner herein, except to the extent, if any, that any one or more of them may be inconsistent with the foregoing numbered exceptions.

Pursuant to the ruling of the Trial Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of the submission of its brief on the merits and the argument of the case before the Commission.

This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,

Alexander & Green,
James D. Ewing,
Of Counsel,
Attorneys for Respondent,
National Lead Company,
No. 120 Broadway,
New York 5, N. Y.

James D. Ewing,
Eugene Z. DuBose,
Of Counsel.

970 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

EXCEPTIONS OF RESPONDENT, ANACONDA COPPER MINING COMPANY, TO TRIAL EXAMINER'S RECOMMENDED DECISION AND TO SAID TRIAL EXAMINER'S FAILURE TO INCLUDE PROPOSED FINDINGS AND CONCLUSIONS REQUESTED BY SAID RESPONDENT.

(Received May 21, 1948.)

Comes now the respondent, Anaconda Copper Mining Company (hereinafter referred to as "Anaconda"), by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice.

971 Exceptions to Section II of the Recommended Decision Entitled "Pleadings and Issues".

1. Page 3, first unnumbered paragraph,* Anaconda excepts to the action of the Examiner in treating it and International Smelting and Refining Company as one and the same for the reason that such assumption is not supported by the record, is opposed to the reliable and probative evidence that has been received and contrary to the law. [Tr. 3537-3538]

Martin v. *Development Co. of America,* 240 Fed. 42 (C. C. A. 9th, 1917);
Majestic Company v. *Orpheum Circuit,* 21 F. (2d) 720 (C. C. A. 8th, 1927);
Esmond Mills v. *Commissioner of Internal Revenue,* 132 F. (2d) 753 (C. C. A. 1st, 1943);
Schenley Corporation v. *United States,* 326 U. S. 432 (1945).

* The pages and paragraphs referred to at the outset of each exception identify that portion of the Trial Examiner's Recommended Decision to which exception is being taken.

2. Page 5, second unnumbered paragraph from bottom of page, Anaconda excepts to this paragraph as not constituting a complete and accurate summary of its answer.

[Anaconda's answer to amended complaint.]

972 3. Page 7, Anaconda excepts to the first three full sentences appearing at the top of the page for the reason that important parts of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and little attention has been paid to the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision Entitled "Report Upon the Evidence".

Count I.

4. Anaconda excepts to the findings as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 9, (1-e); Page 14, (4) and (4-a); Page 16, (4-b); Page 18, (4-c); the first unnumbered paragraph on Page 19; Page 19, (5-a1); Page 20, (5-a2) and (5-a3); Page 21, 5-a4) and (5-a5); Page 22, (5-b2); Page 24, (5-b5); Page 25, (5-b6); Page 26, (5-c1); Page 27, (5-c2); Page 28, 973 (5-c3) and (5-c4); Page 29, (5-c5); Page 30, (5-c6); Page 33, (5-c7) and (5-c8); Page 34, (5-c11) and (5-d); Page 35, (5-e); Page 37, 6-c) and (6-d); Page 39, (7-a3), (7-a4), (7-a5) and (7-a6); Page 40, (7-a8), (7-a9) and (7-b1); Page 41, (7-b2); Page 42, (7-b4); Page 43, (7-c1), (7-c2) and (7-c3); Page 44, (7-c4), (7-c5) and (7-d1); Page 45, (7-d2) and (7-d4), and Page 46, (7-d5).

5. Anaconda adopts as its own and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his report upon the evidence and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Count II.

6. Anaconda excepts to the findings and conclusions as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to
974 this respondent: the third unnumbered paragraph on Page 46; Page 47, (8-a2); Page 50, (9-a) and (9-b); Page 51, (9-d); Page 52, (9-e); Page 53, (9-f); Page 56, (10-g), (10-h) and (10-i); Page 57, (10-k) and (11-a).

7. Pages 46 and 47, Paragraph (8-a1), Anaconda excepts to this paragraph as being unwarranted by the evidence or by law.

Clayton Act, Section 2(a);
Corn Products Refining Co. v. *Federal Trade Commission*, 324 U. S. 726;
Federal Trade Commission v. *A. E. Staley Co.*, 324 U. S. 746.

Exceptions to Section IV of the Recommended Decision Entitled "Recommended Findings and Conclusions".

8. Page 61, Paragraph 1-C, Anaconda excepts to having all references to it and respondent, International Smelting and Refining Company, combined under the name of "Anaconda" in this and subsequent paragraphs of the recommended findings and conclusions. [Record references and authorities in support of this exception are the same as those cited by respondent in Exception "1," Page 2 herein.]

975 9. Anaconda excepts to the findings and conclusions as to it in the following enumerated Paragraphs where it is referred to as "Anaconda" or by such collectives as "respondents," "all respondents," "as between respondents," "each respondent," "other respondents," "competitors" or "smaller competitors" on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 62, 1-F and 1-G; Page 64, 1-J; Page 67, 4-A; Page 68, 4-C; Page 69, 4-D and 5-A1; Page 70, 5-A2 and 5-A3; Page 71, 5-B2; Page 73, 5-B5 and 5-B6; Page 74, 5-C1, 5-C2, 5-C3 and 5-C4; Page 76, 5-C5

and 5-C6; Page 77, 5-C7, 5-C8 and 5-C11; Page 78, 5-D and 5-E; Page 79, 6-A; Page 80, 6-C and 6-D; Page 81, 7-A3, 7-A4 and 7-A5; Page 82, 7-A6, 7-A7 and 7-A8; Page 83, 7-B2; Page 84, 7-C1 and 7-C2; Page 85, 7-C4, 7-C5 and 7-D1; Page 86, 7-D2; Page 87, 7-D4 and 7-D5; Page 88, 8-A1 and 8-A2; Page 89, 9-A; Page 90, 9-B and 9-D; Page 91, 9-E and 9-F; Page 93, 10-F and 10-G; Page 94, 10-H, 10-I, 10-K and 10-L; and Page 95, 11-A.

10. Anaconda adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his recommended findings and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

976

Exceptions to Section V of the Recommended Decision Entitled "Recommended Order".

11. Page 96, Paragraph 1, Page 97, Paragraph 2, Page 98, Paragraphs 4 and 5, Anaconda excepts to its inclusion in the Recommended Order for the reason that there is no evidence in the record that it has been a party to any of the acts complained of in the amended complaint and there is uncontradicted evidence that Anaconda is not engaged in any of the activities covered by the order, and the Examiner has found that there is no reason to believe respondent will ever enter into or engage in the manufacture or sale of lead pigments. [Affidavit of E. O. Sowerwine, Vice President of Anaconda, in support of motion to dismiss amended complaint, pp. 2075-2077; 3543-3544; Trial Examiner's rulings on proposals for findings and conclusions submitted by counsel, March 31, 1948, pp. 1-2.]

977-A Exceptions to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested Under Rule XXI Submitted by This Respondent.

12. Anaconda excepts to the Examiner's denial of the findings requested in Paragraphs "2" and "5" of its proposed Findings and Conclusions and Reasons therefor which were duly filed in this proceeding.

13. Anaconda excepts to the Examiner's denial of Para-

graphs "1," "3" and "4" to "9," inclusive, of the Conclusions of Law requested by it and reasserts that these Conclusions were proper statements of the law on the points involved and that the denial thereof was contrary to both the evidence and the law.

Anaconda adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the respondent, International Smelting and Refining Company.

Pursuant to the ruling of the Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of submission of its brief on the merits and the argument of the case before the Commission.

977-B This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,

Chadbourne, Wallace, Parke & Whiteside,
By /s/ H. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York,
Attorneys for Respondent, Anaconda Copper Mining Company.

978 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

EXCEPTIONS OF RESPONDENT, INTERNATIONAL SMELTING AND REFINING COMPANY, TO TRIAL EXAMINER'S RECOMMENDED DECISION AND TO SAID TRIAL EXAMINER'S FAILURE TO INCLUDE PROPOSED FINDINGS AND CONCLUSIONS REQUESTED BY SAID RESPONDENT.

Comes now the respondent, International Smelting and Refining Company, hereinafter referred to as "International"), by its attorneys, Chadbourne, Wallace, Parke & Whiteside, and, pursuant to Rule XXIII of the Rules of Practice of this Commission, submits the following exceptions to the Trial Examiner's Recommended Decision herein and to the failure of said Trial Examiner to include proposed findings and conclusions heretofore requested by this respondent under Rule XXI of said Rules of Practice.

979 Exceptions to Section II of the Recommended Decision Entitled "Pleadings And Issues".

1. Page 1, first unnumbered paragraph*, International excepts to the action of the Examiner in treating it and Anaconda Copper Mining Company as one and the same for the reason that such assumption is not supported by the record, is opposed to the reliable and probative evidence that has been received and contrary to the law. [Tr. 3537-3538; *Martin* v. *Development Co. of America*, 240 Fed. 42 (C. C. A. 9th, 1917); *Majestic Company* v. *Orpheum Circuit*, 21 F. (2d) 720 (C. C. A. 8th, 1927); *Esmond Mills* v. *Commissioner of Internal Revenue*, 132 F. (2d) 753 (C. C. A. 1st, 1943); *Schenley Corporation* v. *United States*, 326 U. S. 432 (1945).]

2. Page 5, third unnumbered paragraph, International excepts to this statement, it being an inaccurate and incomplete statement of its answer to the amended complaint.

3. Page 6, International excepts to the inclusion of the following as one of the "issues" herein:

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* The pages and paragraphs referred to at the outset of each exception identify that portion of the Trial Examiner's Recommended Decision to which exception is being taken.

980 "Were the tendencies and effect of these transactions to restrain trade, suppress competition, or create monopolies through unequal cost factors and identical delivered prices."

[Amended Complaint, Paragraph "Eleven"; Federal Trade Commission Act, Section 5; Sherman Act, Sections 1 and 2.]

4. Page 6, International excepts to the inclusion of the following as one of the "issues" herein:

"Did respondent's employment of the zone system, as alleged, involve differences in price between customers (a) located in a zone and (b) located in different zones, which differences were more than differences in cost, sale and delivery?"

[Clayton Act, Section 2(a).]

5. Page 6, International excepts to the paragraph following the paragraph hereinabove quoted because of the inclusion of the words "so discriminate" on the same grounds as objected to in "4" above.

6. Page 6, International excepts to the second sentence in the paragraph beginning at the bottom of the page for the reason that it is improper to attempt to answer the issues by "inference" were it would conflict with reliable probative and substantial evidence.

981 7. Page 7, International excepts to the first three full sentences appearing at the top of the page for the reason that important parts of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and little attention has been paid to the greater weight of the evidence herein.

Exceptions to Section III of the Recommended Decision Entitled "Report Upon the Evidence".

Count I.

8. Page 14, Paragraph (4) International excepts to the second sentence as being unsupported by the record.

9. Page 16, Paragraph (4-b) and Page 18, Paragraph (4-c), International excepts to these paragraphs on the ground that they are not supported by the record as to this respondent.

10. Page 19, Paragraph (5), International excepts to the next to the last sentence for the reason that it is im-

proper to attempt to answer the issues by "inference" where it would conflict with reliable probative and substantial evidence.

982 II. International excepts to the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 19, (5-a1); Page 20, (5-a2); Page 22, (5-b2); Page 26, (5-c1); Page 27, (5-c2); Page 33, (5-c8) and (5-c9).

12. Page 35, Paragraph (5-d), International excepts to that part of the paragraph appearing on this page as being unsupported by the record. [Answers of all respondents to amended complaint.]

13. Page 37, Paragraph (6-c) and the second and third sentences of Paragraph (6-d), International excepts to the cited portions of these Paragraphs as being unsupported by the record as to this respondent.

14. Page 38, Paragraph (6-d), International excepts to the statement that Anaconda of International had a plant in Chicago. [Tr. 3489-3543.]

15. Pages 39 and 40, Paragraphs (7-a3), (7-a4), (7-a6), (7-a8) and (7-a9), International excepts to these Paragraphs as being unsupported by the record as to this respondent.

983 16. Page 40, Paragraph (7-b1) and Page 41, Paragraph (7-b2), International excepts to these Paragraphs as they contain statements, inferences and insinuations unsupported by the evidence.

17. Pages 43 and 44, Paragraphs (7-c1), (7-c2), (7-c4) and (7-c5), International excepts to these Paragraphs as being unsupported by the evidence or directly contrary to the reliable probative and substantial evidence herein.

18. Page 44, Paragraph (7-d1), International excepts to this Paragraph. [National Industrial Recovery Act, Section 5; 48 Stat. 195, 198.]

19. Page 45, Paragraphs (7-d2), (7-d4) and (7-d5), International excepts to these Paragraphs on the Ground that they are unsupported by the record as to this respondent. [*Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321, 329; *Sugar Institute* v. *United States*, 297 U. S. 553; *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563; *United States* v. *General Electric Co.*, 272 U. S. 476; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-99; *United States* v. *U. S. Steel Corporation*, 251 U. S. 417; *United States* v. *International Harvester Co.*,

274 U. S. 693; *United States* v. *Standard Oil of New*
984 *Jersey*, 47 F. (2d) 288; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344.]

20. International adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his report upon the evidence and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Count II.

21. Page 46, International excepts to the third unnumbered Paragraph under this subject in so far as the same incorporates the items set forth in the Report Upon The Evidence at Pages 7 to 46 on the same grounds as hereinabove set out in this respondent's exceptions to Count I.

22. Page 46, Paragraph (8-a1), International excepts to this Paragraph as being unwarranted by the evidence or by law. [Clayton Act, Section 2(a); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

985 23. Page 49, Paragraph (8-a3), International excepts to this Paragraph as being unsupported by record references or any other portion of the record.

24. Page 50, Paragraph (9-a), International excepts to references that Anaconda charged consignment dealers in the par zone $1.00 less per cwt. than its price to competing dealers at the same locations as being unsupported by the record as to this respondent.

25. Page 56, Paragraph (10-h), International excepts to this Paragraph as being unsupported by the record as to this respondent.

26. Page 57, Paragraph (10-l), International excepts to the first sentence as being unsupported by the record as to this respondent.

27. Page 57, Paragraph (10-m), International excepts to the word "discriminations" in the first line, and to the last two sentences of said Paragraph as being unsupported by the record as to this respondent.

28. Page 57, Paragraph (11-a), International excepts to this Paragraph for the reason that it is unsupported by

the evidence and is contrary to law. [*Federal Trade*
986 *Commission* v. *A. E. Staley Co.*, 324 U. S. 746; *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 451; *Swift & Co.* v. *United States*, 196 U. S. 375, 400; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 198-99; *United States* v. *International Harvester Co.*, 274 U. S. 693; *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288.]

Exceptions to Section IV of the Recommended Decision Entitled "Recommended Findings and Conclusions".

29. Page 61, Paragraph 1-C, International excepts to having all references to it and respondent, Anaconda Copper Mining Company, combined under the name of "Anaconda" in this and subsequent paragraphs of the recommended findings and conclusions. [Record references and authorities in support of this exception are the same as those cited by respondent in Exception "1," Page 2 herein.]

30. International excepts to the findings and conclusions in the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent; Page 62 1-G; Page 68, 4-C; Page 69, second sentence of 4-D; Page 69, 5-A1; Page 70, 5-A2
987 and 5-A3; Page 71, 5-B2 and Page 72, 5-B4.

31. Page 73, second sentence of the first unnumbered paragraph of Paragraph 5-B5, International excepts to the finding that it or Anaconda sold dry white lead on a consignment basis in Wisconsin. [Tr. 3533.]

32. International excepts to the findings and conclusions in the following enumerated Paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 74, 5-C1; Page 76, 5-C5; Page 77, 5-C8 and the first two sentences of 5-C11; Page 78, 5-D; Page 80, 6-D; Page 81, 7-A3 and 7-A4; Page 82, 7-A6, 7-A7 and 7-A8.

33. Page 83, Paragraph 7-B2, International excepts to this Paragraph, with the exception of the second sentence, on the ground that the findings as to it are unsupported by the record and cannot be "inferred" from the evidence that has been received.

34. Page 84, Paragraph 7-C2 and Page 85, Paragraph 7-C4, International excepts to these Paragraphs as being without foundation in law and unsupported by the record as to this respondent.

35. Page 85, Paragraphs 7-C5 and 7-D1, International

988 excepts to these Paragraphs on the ground that these findings are unsupported by the record as to this respondent.

36. International excepts to the findings in the following enumerated Paragraphs as being unsupported by the record and without foundation in law: Page 85, 7-D1; Page 86, 7-D2; Page 87, 7-D4 and 7-D5.

37. Page 87, the third unnumbered paragraph of Paragraph 8-A, International excepts to this Paragraph in so far as the same incorporates the facts relating to the parties, zone pricing, price differences, differentials and other features bearing on the issues under Count II, which are set out in the Report Upon the Evidence under Count I, and adopts as its exceptions and authorities thereto those exceptions hereinabove set out by this respondent to Count I.

38. Page 88, Paragraph 8-A1, International excepts to this Paragraph as being unwarranted by the evidence or by law. [Clayton Act, Section 2(a); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

989 39. International excepts to the findings and conclusions in the following enumerated paragraphs on the ground that each and all of such findings are unsupported by the record as to this respondent: Page 89, 9-A; Page 91, 9-E and 9-F; Page 93, first two sentences of 10-E and 10-F; Page 94, 10-H, 10-J and 10-L.

40. Page 95, Paragraph 11-A, International excepts to this Paragraph on the ground that it is unsupported by the record and contrary to law. [*Federal Trade Commission* v. *A. E. Staley Co.*, 324 U. S. 746.]

41. International adopts as its own, and incorporates herein by reference, each and every exception and the authorities in support thereof to the Examiner's Recommended Decision which are taken by the other respondents herein to his recommended findings and conclusions as to conspiracy, collusion, agreement and cooperation between or among any or all of said respondents.

Exceptions to Section V of the Recommended Decision Entitled "Recommended Order".

42. Page 96, Paragraph 1, Page 97, Paragraph 2 and Page 98, Paragraphs 4 and 5, International excepts to its inclusion in the Recommended Order for the reason that the record does not sustain the finding that it was
990 a party to, or was engaged in, any of the acts com-

plained of in the amended complaint, and there is uncontradicted evidence that International is not engaged in any of the activities covered by the order, and the Examiner has found that it is no longer in the business of selling or manufacturing lead pigments and that there is no reason to believe International will ever reenter or reengage in the manufacture or sale of lead pigments. [Com. Ex. 836B; Affidavit of Frederick Laist, Vice President of International, in support of motion to dismiss amended complaint; pp. 2075-2077; 3541-3543; Trial Examiner's rulings on proposals for findings and conclusions submitted by counsel, March 31, 1948, p. 2.]

Exceptions to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested Under Rule XXI Submitted by This Respondent.

43. International excepts to the Examiner's denial of the findings requested in Paragraphs "16," "20," "21," "22," "25," "28," "29," "30," "31" and "32" of its proposed Findings and Conclusions and Reasons therefor which were duly filed in this proceeding.

44. International excepts to the Examiner's denial of Paragraphs "1" to "8," inclusive of the Conclusions of Law requested by it and reasserts that these Conclu-
991 sions were proper statements of the law on the points involved and that the denial thereof was contrary to both the evidence and the law.

Pursuant to the ruling of the Examiner herein, this respondent reserves the right to file further proposals and further exceptions at the time of submission of its brief on the merits and the argument of the case before the Commission.

This respondent respectfully requests argument on the above exceptions at the time of the argument before the Commission on the merits.

Respectfully submitted,
Chadbourne, Wallace, Parke & Whiteside,
By A. E. Gardiner,
Office and Post Office Address,
No. 25 Broadway,
Borough of Manhattan,
City of New York,
Attorneys for Respondent, International Smelting and Refining Company.

993 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption 5253) * *

EXCEPTIONS ON BEHALF OF THE SHERWIN-WILLIAMS COMPANY TO THE TRIAL EXAMINER'S RECOMMENDED DECISION.

(Received May 21, 1948.)

Comes now the respondent, The Sherwin-Williams Company, by its attorneys, pursuant to Rule XXIII of the Commission's Rules of Practice, and submits its exceptions to the Trial Examiner's Recommended Decision herein and to the Trial Examiner's failure to include therein the findings and conclusions requested by it under Rule XXI of said Rules of Practice.

A. In so far as Section II, entitled "Pleadings and Issues", of the Trial Examiner's Recommended Decision is concerned Sherwin takes the following exceptions:

1. Sherwin excepts to Item 5(d) on page 4 of the Recommended Decision (Paragraph 9(B), Count I of the Amended Complaint).

2. Sherwin excepts to Item 5(e) on page 4 of the Recommended Decision (Paragraph 9(C), Count I of the Amended Complaint).

3. Sherwin excepts to the third full paragraph on page 5 of Section II of the Recommended Decision as not constituting a complete and accurate summary of its Answer (Sherwin's Answer to Amended Complaint).

994 4. Sherwin excepts to the Trial Examiner's failure to include in Section II of the Recommended Decision a summary of its special defenses (Sherwin's Answer to Amended Complaint, pages 16-19).

5. Sherwin excepts to that portion of Section II of the Trial Examiner's Recommended Decision entitled "The Issues" in its entirety (compare Trial Examiner's statement with Amended Complaint and Sherwin's Answer thereto; also see Federal Trade Commission Act, Sec. 5; Clayton Act, Sec. 2(a) and Tr. 4209-4252).

6. Sherwin excepts to the Trial Examiner's failure to include in that portion of Section II of the Recommended Decision entitled "The Issues" a statement relative to the issues raised by Sherwin in its special defenses. (Com-

pare Trial Examiner's statement with Sherwin's Answer to Amended Complaint, pages 16-19).

7. Sherwin excepts to the first three full sentences appearing at the top of page 7 of the Recommended Decision for the reasons that important portions of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and no reasonable regard has been had for the greater weight of the evidence herein.

B. In so far as Section III, entitled "Report Upon the Evidence", and Section IV, entitled "Recommended Findings and Conclusions", and concerned, Sherwin takes the following exceptions:

8. Sherwin excepts to the Trial Examiner's failure to state in the second paragraph of that portion of Section III of the Recommended Decision, which is entitled "Count One", that Sherwin does not manufacture or sell basic lead sulphate or any other lead pigments except red lead, litharge and basic lead carbonate and also excepts to the Examiner's failure to include a statement to such effect in Paragraph 1-F of Section IV of the Recommended Decision (Tr. 1313).

9. Sherwin excepts to the Trial Examiner's failure to state in that portion of Section III of the Recommended Decision, which is entitled "Count One", that for over twenty years Sherwin has not manufactured red lead or litharge for use by the battery manufacturing industry and is not a competitor in that field which has been an increasingly important one since the advent of the automobile and the internal combustion engine (Tr. 1640, 1648, 4070, 4093).

995 10. Sherwin excepts to the last sentence in the second paragraph of that portion of Section III of the Recommended Decision entitled "Count One" for the reason that the record does not establish the fact that it purchases lead pigments from others for the purpose stated, and also excepts to the last sentence of Paragraph 1-F of Section IV of the Recommended Decision for the same reason.

11. Sherwin excepts to the Trial Examiner's failure to report in that portion of Section III of the Recommended Decision entitled "Count One" as follows: "Sherwin's only lead pigment plant is located in Chicago, Illinois. In 1943, and for many years prior thereto, Sherwin shipped about 5% of the white lead in oil shipped by the industry.

For many years its shipments of dry white lead and litharge to customers represented less than 1%, respectively, of the total industry shipments, while its shipments of dry red lead and red lead in oil were approximately nil. Sherwin is not an important factor in the sale of lead pigments, particularly red lead and litharge, and it does not sell dry read lead or litharge on the Pacific Coast. Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio. The record contains no evidence that carload shipments of red lead and litharge are made by Sherwin to purchasers located in differential territories." Sherwin also excepts to the Trial Examiner's failure to include in Paragraph 1-F of Section IV of the Recommended Decision a finding to the foregoing effect (Tr. 1313-1332, 1648, 2065-2066, 3746).

12. Sherwin excepts to the sentence which immediately precedes the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision, for the reason that such sentences do not indicate that the term "white lead, dry and in oil," includes only basic carbonate (CX 666, CX 669), and also excepts to the Examiner's failure (1) to report that basic lead sulphate is used to a substantial extent by Eagle, and to some extent by National, as an alternative product to basic carbonate in sales to paint manufacturers, and (2) to report, in so far as the record discloses, the extent of the production and sale of basic sulphate by Eagle and National (Tr. 1560-1561, 3344-3352, 3354-3357, 4129).

13. Sherwin excepts to the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J 996 of Section IV, of the Recommended Decision (CX 669, Tr. 1560-1561, 2193, 3344-3352, 3354-3357, 4129).

14. Sherwin excepts to the sentence immediately following the second tabulation in Paragraph 1-e of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision for the reason that there is not included therein an additional statement relative to Eagle's and National's production and sale of basic lead sulphate as an alternative product for basic carbonate (Tr. 1560-1561, 3344-3352, 3354-3357, 4129).

15. Sherwin excepts to the first two sentences in the last subparagraph in Paragraph 1-e of Section III, and in the last subparagraph of Paragraph 1-J of Section IV, of the Recommended Decision, except the statement to the effect

that National became a predominant factor in the industry. (The Citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

16. Sherwin excepts to the last sentence in Paragraph 2-a of Section III, and in Paragraph 2-A of Section IV, of the Recommended Decision (Tr. 1327-1328, 2065-2066).

17. Sherwin excepts to Paragraph 4-a of Section III, and to Paragraph 4-a of Section IV, of the Recommended Findings in that the first sentence thereof erroneously indicates, by use of the term "the other respondents", that Sherwin followed the salient features of the zone pricing system therein described and in that the description of the system and the citations set forth on pages 14, 15 and 16 (which description and maps are incorporated in Paragraph 4-A of Section IV by reference) do not accurately reflect Sherwin's pricing and freight practices as established by the record. Sherwin also excepts to the Examiner's failure to include in Section III an accurate statement of its pricing practices and to include in Section IV a recommended finding based thereon (Tr. 836, 887-891, 894, 1312-1319, 1324-1325, 1327-1328, 1331-1332, 1640, 1648, 2066, 3697, 3701-3702, 3704, 3707-3709, 3746-3747, 3754-3759, 3768-3769, 3771-3804, 3836-3856, 4075, 4093, 4104-4113; CX 506 E, 594, AB, CX 613, CX 626-631-F, CX 650, CX 659 C-P, CX 662, A-226, CX 781 A-C, CX 782 CDF, CX 784 BDF, CX 787-789, CX 793, CX 794, A-Z 8, CX 823 A-G; RX 158, RX 198 A-H, RX 205 A-X, RX 209; Answers of Sherwin, Glidden and International to 997 Amended Complaint: For an accurate summary of Sherwin's pricing and freight practices see Proposed Findings submitted by Sherwin and especially Paragraphs Seven, Eight and Nine under Count I).

18. Sherwin excepts to the last subparagraph of Paragraph 4-a of Section III, and to the last sentence in the last subparagraph of Paragraph 4-A of Section IV, of the Recommended Decision for the reason that the Examiner fails to state which respondents have plants located in each of the various cities therein named and which pigments are produced in each of such plants and also fails to affirmatively state that Sherwin's only lead pigment plant is located in Chicago, Illinois (Tr. 1313 and Examiner's citations).

19. Sherwin excepts to the first two sentences of the second subparagraph of Paragraph 4-b of Section III, and the first two sentences of Paragraph 4-B of Section IV, of

the Recommended decision (RX 6 A-1, 7 A-C, 8 AB, 9 A-F, 12, 13 A-D, 50 KLO, 77 A-F, 81 AB, 83, A-Z3, 85 A-Z13, 92 AB, 127 A-G, 134 A-E, 135 AB, 136 AB, 137 AB, 138 AB, 159 D, 198 A-H; CX 501 A-D, 502 AC, 504 AB, 505 AB, 507 A-M, 508 C, 518 AB, 594 AB, 654, 652 A-K, 659 C-P, 662 CDGHST, 705 A-D, 706 A-D, 776, 799, 800 A-C, 801 AB, 802 AB, 803, 805 A-C, 809; Tr. 1313, 1316-1318, 2153-2154, 2170, 2175, 2228-2230, 2238-2245, 2308, 2397-2398, 3697, 3699-3700, 3713-3716, 3759-3760, 3767-3768, 3838-3840, 3846, 3850; in addition, the citations urged in connection with exception 17 are also relied upon in support of the foregoing exception).

20. Sherwin excepts to Paragraph 4-c of Section III, and of Paragraph 4-C of Section IV, of the Recommended Decision (CX 504 B, CX 505 A, CX 507 A-M, CX 517 A, CX 518 AB, CX 523, CX 803 and Examiner's citation).

21. Sherwin excepts to Paragraph 4-d of Section III, and to Paragraph 4-D of Section IV, of the Recommended Decision. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17 and 19).

22. Sherwin excepts to the second sentence of Paragraph 5 of Section III of the Recommended Decision, for the reason that the record establishes substantial variance between the practices employed by it individually as compared to practices employed by the other respondents herein. (Citations relied upon for the foregoing ex-
998 ception are the same as those urged in connection with exceptions 17 and 19).

23. In so far as Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and Paragraphs 5-A-1, 5-A-2, 5-A-3, and 5-A-4 of Section IV, of the Recommended Decision are concerned, Sherwin, for brevity and in order to avoid duplication, adopts and incorporates herein by reference the exceptions taken to said paragraphs by respondent National and relies upon the same citations, together with the citations appearing herein in connection with exception 19, as support for such exceptions.

24. Sherwin excepts to Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and to Paragraphs 5-A-1, 5-A-2, 5-A-3 and 5-A-4 of Section IV, of the Recommended Decision in so far as such paragraphs may infer that Sherwin actually agreed to employ the provisions of Schedule "A", except if and when said Schedule "A" became an effective part of the N. R. A. Code for the In-

dustry (which it did not), or that Sherwin actually employed the provisions of said Schedule "A" as a result of any agreement to do so or otherwise. (Tr. 1327, 2066, CX 823 CD; in addition, the citation urged in connection with exceptions 17 and 26 are relied upon in support of the foregoing exception).

25. Sherwin excepts to Paragraphs 5-b-6 of Section III, and to Paragraph 5-B-6 of Section IV, of the Recommended Decision. (Tr. 869-870, 3696-3697; 3700-3701; RX 229-305; CX 506 E, CX 539, CX 576 A-E, CX 594 AB, CX 652 A-L, CX 662 CDGHKLST, CX 662 Z5-Z26, CX 684-685, CX 776 A-L; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

26. Sherwin excepts to Paragraph 5-c-1 of Section III, and to Paragraph 5-C-1 of Section IV, of the Recommended Decision for the reason that neither the record references therein cited nor the record as a whole supports the statements therein made. (Tr. 1313-1314, 1324-1328, 1331-1332, 1648, 1650, 2065-2066, 3746, 3874-3882, 4070, 4093; CX 823 A-G, CX 782 C; RX 209; in addition, the citations urged in connection with exceptions 17 and 19 are relied upon in support of the foregoing exception).

27. Sherwin excepts to the first sentence of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2 of Section IV, of the Recommended Decision in so far as such sentences imply an unlawful purpose to the avoidance of reference to particular prices in Schedule "A" as such inference is entirely unwarranted by the record (Tr. 2218-2234, Tr. 2402-2403; RX 6-I, 8-AB, 9 A-F, 78-BC; CX 504-B, 507 A-M, 517-A, 523).

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28. Sherwin excepts to the third, fourth and fifth sentences of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2, of the Recommended Decision as not being supported either by the record citations therein given or by the record as a whole (Tr. 1326-1328, Tr. 2065-2066 and citations by Examiner).

29. Sherwin excepts to the entire second subparagraph of Paragraph 5-C-2 of Section III, and of Paragraph 5-C-2 of Section IV, of the Recommended Decision for the reason that the statements made in such subparagraph are not sustained by the record citations therein given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

30. Sherwin excepts to the fourth sentence of Paragraph 5-c-4 of Section III, and of Paragraph 5-C-4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the citations given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

31. Sherwin excepts to the second sentence of Paragraph 5-c-5 of Section III, and of Paragraph 5-C-5 of Section IV, of the Recommended Decision for the reason that such sentence erroneously states that the table immediately following refers (1) to white lead in oil and other keg products, and (2) involves 100 pounds or larger containers. (The citations relied upon in support of the foregoing exception are those given by the Examiner in the table immediately following this sentence).

32. Sherwin excepts to the completeness and accuracy of the table set out in Paragraph 5-c-5 of Section III, and incorporated by reference in Paragraph 5-C-5 of Section IV, of the Recommended Decision. (Tabulation pages 31 and 32 of Recommended Decision and exhibits there cited; Tr. 2095-2909; CX595, CX599, CX 613 A-C, CX 506 DE, CX 712 A, CX 596 AB, CX 597, CX 598, CX 685, 1000 CX 629 A-C; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

33. Sherwin excepts to that portion of Paragraph 5-c5 of Section III and of Paragraph 5-C5 of Section IV, of the Recommended Decision which erroneously indicates that certain shipping points were used by Sherwin during the entire period reflected in the tabulation also appearing in such paragraphs. (The citations relied upon are those given by the Examiner in the tabulation).

34. Sherwin excepts to the second sentence of the last subparagraph of 5-c5 of the Recommended Decision. (The citations urged in connection with exception 39 are relied upon in support of the foregoing exception).

35. Sherwin excepts to the Examiner's failure to include in Paragraph 5-C5 a statement to the effect that freight costs from Sherwin's shipping points to purchasers' destination would have to be ascertained and added to the quotations appearing in the table set out in full in Paragraph 5-c5, and incorporated in Paragraph 5-C5 by reference, in order to make accurate comparison as to the

purchasers' relative costs in buying from the various respondents. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17 and 32).

36. Sherwin excepts to the second sentence in Paragraph 5-c6 of Section III, and in Paragraph 5-C6 of Section IV, of the Recommended Decision, and to the correctness of the tabulations appearing in such paragraphs for the reason that the statements made therein and the figures in such tabulations are not supported by the Examiner's citations.

37. Sherwin excepts to the statement in the first sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision, to the effect that its customers have substantially the same delivered cost as do customers of Glidden and International. (Tr. 1249, 2639-2640, 3516; Answers of International and Glidden to Amended Complaint; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

1001 38. Sherwin excepts to the statement in Paragraph 5-c7 of Section III of the Recommended Decision setting forth the number of sales made by it at varying amounts under National's lowest price, and also to the correctness of the variances stated (CX 794-D, I, Z- Z-1, and Z4, CX 613, CX 626-631 F, CX 650, CX 662 Z5-Z26; RX 158).

39. Sherwin excepts to the statement in the last sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision to the effect that the deviations by Sherwin are subject to the subtraction of a small freight factor which the customer sometimes paid from nearby shipping points, as such statement does not fairly reflect the status of the record and is not supported by the greater weight of the reliable, probative and substantial evidence in the record. (CX 662-Z21, CX 793, CX 794-D, I, J1, Z1, Z2, Z4, Z5, Z6 and Z7, CX 833 A-Z100; RX 198 A-H, RX 205 A-X; Tr. 836, 887-894, 1249, 2639-2640, 3516, 3746, 4104-4113; in addition, the citation urged in connection with exception 17 are relied upon in support of the foregoing exception).

40. Sherwin excepts to the last sentence of Paragraph 5-c8 of Section III, and of Paragraph 5-C8 of Section IV, of the Recommended Decision, as not being supported by

the record (CX 794, D-I, Y, Z; RX 198 A-H; Tr. 3801; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception.)

41. Sherwin excepts to Paragraph 5-c9 of Section III, and to Paragraph 5-C9 of Section IV, of the Recommended Decision, as not being supported by the citations given or by the record as a whole. (The citations relied upon for the foregoing exception are the same as those urged in connection with exception 17, also Tr. 1337-1480).

42. Sherwin excepts to the juxtaposition existing between the third sentence and the first and second sentences of Paragraph 5-c-11 of Section III, and of Paragraph 5-C-11 of Section IV, of the Recommended Decision for the reason that such juxtaposition gives rise to an improper inference that Sherwin's instructions in the third sentence were given as a result of the events described in the first two sentences and such inference is not warranted from the exhibits cited or from the record.

1002 43. In the event the words "instructions are given for following large dealers' prices", in the third sentence of Paragraph 5-c11 of Section III, and of Paragraph 5-C11 of Section IV, of the Recommended Decision, are to be interpreted as meaning that Sherwin's managers and salesmen are instructed to follow its large competitors' (such as National and Eagle) prices on government, state and municipal bids, then Sherwin excepts to such interpretation as not being warranted from the exhibits cited or from the record as a whole (CX 662 A and exhibits cited by Examiner.)

44. Sherwin excepts to the third sentence of Paragraph 5-c11 of Section III, and of Paragraph 5-C11 of Section IV, of the Recommended Decision, in so far as such sentence indicates that such instructions are now in effect or were in effect over a substantial period of time extending at least from November 6, 1936, to May 1942.

45. Sherwin excepts to the fourth, fifth, sixth and seventh sentences of Paragraph 5-c-11 of Section III, and of Paragraph 5-C-11 of Section IV, for the reason that such sentences do not correctly state all the facts with respect to the transactions therein referred to and do not correctly reflect the number of instances in which the respondents bid varying prices in competitive bids or the extent of such variance (Citations in support of the foregoing exceptions are the same as those relied upon by the Examiner).

46. Sherwin excepts to all of Paragraph 5-d of Section III, and of Paragraph 5-D of Section IV, of the Recommended Decision, except that portion of the last sentence of such paragraph beginning with the words "and it was shown" in the seventh line from the end thereof, for the reason that the statements contained therein are not supported by the record (CX 662-W, Z3, Z5, O, CX 823-G).

47. Sherwin excepts to the sixth sentence of Paragraph 5-e of Section III of the Recommended Decision for the reason that the citation to the record in support thereof reveals that the testimony cited was directly to the contrary and the exhibits cited have no connection whatever with the subject matter.

48. Sherwin excepts to the last three sentences of Paragraph 5-e of Section III for the reason that neither the citations given by the Examiner nor the record as a
1003 whole establish that its formula for pricing oxides in carload quantities was the same as that of any other respondent or that its less than carload prices for oxides was based on a formula derived from its carload price for such products (CX 809, CX 823 A-F).

49. Sherwin excepts to Paragraph 5-f of Section III, and of Paragraph 5-F of Section IV, of the Recommended Decision for the reason that neither the exhibits cited nor the record as a whole establishes the fact nor justifies the inference that Sherwin sells 97% and 98% red lead at the added differentials stated because of any provisions of Schedule "A" of the N. R. A. Code for the industry or pursuant to any agreement or understanding to do so. (CX 782-C, CX 823-EF; Tr. 3870).

50. Sherwin excepts to the first sentence of Paragraph 6-a of Section III, and of Paragraph 6-A of Section IV, of the Recommended Decision for the reason that the extent of control stated for white lead does not include basic sulphate of lead which is used interchangeably with basic carbonate to a substantial extent by Eagle and to some extent by National. (Citations urged in support of the foregoing exceptions are the same as those relied upon in connection with exceptions 12, 13 and 14).

51. Sherwin excepts to the second and third sentences of Paragraph 6-b of Section III of the Recommended Decision for the reason that the statements contained therein do not accurately or correctly describe Sherwin's pricing methods and excepts to the Examiner's failure to set out in such paragraph and in Paragraph 6-B of Section IV a

correct statement of Sherwin's practices. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17 and 26).

52. Sherwin excepts to the second and third sentences in Paragraph 6-d of Section III, and in Paragraph 6-D of Section IV, of the Recommended Decision, for the reason that the statements therein contained are unsupported by the record in so far as Sherwin is concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 26, 36, 37, 38, 39 and 40).

53. Sherwin excepts to the Examiner's failure to include in Paragraph 6-D of Section IV of the Recommended Decision a finding based upon the statements contained in the last six sentences of the first subparagraph of Paragraph 6-d of Section III.

54. Sherwin excepts to Paragraph 7-a3 of Section III, and to Paragraph 7-A3 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to and not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 25, 26, 37, 38, 39, 40 and 41.)

55. Sherwin excepts to all of Paragraph 7-a4 of Section III, and of Paragraph 7-A4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 23, 24, and 26.)

56. Sherwin excepts to Paragraph 7-a6 of Section III, and of Paragraph 7-A6 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17, 26, 27, 28, 29, 31, 32, 33, 34, 36 and 46, whether set forth verbatim or by reference, are relied upon in support of the foregoing exception.)

57. Sherwin excepts to Paragraph 7-a8 of Section III, and to Paragraph 7-A7 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 43 and 45,

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whether set forth verbatim or incorporated by reference, are relied upon in support of the foregoing exception.)

58. Sherwin excepts to Paragraph 7-a9 of Section III, and of Paragraph 7-A8 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17 and 25 are relied upon in support of the foregoing exception.)

1005 Sherwin excepts to the second sentence of the second sub-paragraph of Paragraph 7-b1 of Section III of the Recommended Decision in so far as such sentence states that the evidence discloses that Sherwin had a mutual understanding with any of the other respondents concerning the plan described in Paragraph 7-b1 or accepted the plan and its objectives and agreed to follow it for the reason that neither the record nor the inferences reasonably to be drawn therefrom support such statements. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26 and 27).

60. Sherwin excepts to that portion of Paragraph 7-b2 of Section III, and of Paragraph 7-B2 of Section IV, of the Recommended Decision, which state that its prices, though substantially lower than those of National and Eagle, were very close to the prices of Glidden and International for the reason that such statements are not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40).

61. Sherwin excepts to the next to the last sentence in Paragraph 7-b2 in Section III, in Paragraph 7-B2 of Section IV, of the Recommended Decision, in so far as such sentences state that there was an agreement between either Anaconda or International to conform to Glidden's and Sherwin's prices with a minimum of deviation, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40).

62. Sherwin excepts to the third sentence in Paragraph 7-b3 of Section III, and in Paragraph 7-B3 of Section IV, of the Recommended Decision in so far as such sentences

state that the practices therein attributed to Glidden were identical to those used by Sherwin for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 37, 38, 39 and 40).

1006 63. Sherwin excepts to Paragraph 7-b4 of Section III, and to Paragraph 7-B4, of Section IV, of the Recommended Decision, except that portion of the second sentences thereof which states that Sherwin did not use the consignment plan for controlling retail prices, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

64. Sherwin excepts to the first two sentences and the last sentence of Paragraph 7-c2 of Section III, and of Paragraph 7-C2 of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

65. Sherwin excepts to Paragraphs 7-c4 and 7-c5 of Section III, and to Paragraph 7-C4 and 7-C5 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46).

66. Sherwin excepts to Paragraphs 7-d1, 7-d2, 7-d4 and 7-d5 of Section III, and to Paragraphs 7-D1, 7-D2, 7-D4 and 7-D5 of Section IV, of the Recommended Decision for the reason that the conclusions stated in said paragraphs are either not supported by the record at all or are directly contrary to the weight of the reliable, probative and substantial evidence appearing in the record and are contrary to law. (Citations relied upon in connection with the foregoing exception are the same as those specifically relied upon in support of each and every specific exception herein

stated; RX's. 6 through 8, inclusive; see also: National Industrial Recovery Act, Section 5, 48 Stat. 195, 198; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 329; *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533, 549; *Sugar Institute* v. *United States*, 297 U. S. 553; *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 488; *Maple Flooring Assn.* v. *United States*, 1007 268 U. S. 563; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 198-199; *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417; *U. S.* v. *International Harvester Co.*, 274 U. S. 693; *U. S.* v. *Standard Oil of N. J.*, 47 F. 2d 288; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *U. S.* v. *U. S. Steel Corporation*, 233 Fed. 55, 251 U. S. 417; *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 424).

67. Sherwin excepts to the third paragraph of Count Two (page 46) of Section III, and the third subparagraph of Paragraph 8-A (page 87) of Section IV, of the Recommended Decision in so far as such paragraphs incorporate, by reference, the facts relating to zone pricing, price differences, differentials and other features bearing on the issues under Count Two, which are set out in Section III at pages 7-38, inclusive, to the same extent as if the specific exceptions heretofore taken were again restated verbatim. (The citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 8-53, inclusive.)

68. Sherwin excepts to Paragraph 8-a1 of Section III, and to Paragraph 8-A1 of Section IV, of the Recommended Decision for the reason that the statements contained therein, in so far as Sherwin is concerned, do not accurately portray its basic freight policy as disclosed in the record, and excepts to the Examiner's failure to correctly describe its pricing and freight policies. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

69. Sherwin excepts to Paragraph 8-a2 of Section III, and to Paragraph 8-A2 of Section IV, of the Recommended Decision for the reason that the freight tabulations set forth in Paragraph 8-a2, and incorporated in Paragraph 8-A2 by reference, are neither applicable to nor properly descriptive of any of Sherwin's shipping or freight practices. (Citations urged in support of this exception are the same as those relied upon in connection with exception 17; Tr. 3777).

70. Sherwin excepts to Paragraph 8-a3 of Section III, and to Paragraph 8-A3 of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Sherwin's shipping or freight practices as disclosed in the record and neither the citations to the transcript nor the citations to various Commission's Exhibits reveal in any way, Sherwin's 1008 freight or shipping policies. (Citations urged in support of the foregoing exception are the same as those relied upon in exception 17; also, Tr. 4070, 1338-1480, 1672-2018).

71. Sherwin excepts to Paragraph 9 of Count Two of Section III wherein the Examiner has incorporated the evidence set out in Count One of Section III of the Recommended Decision relative to differences in trade, regional, quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between carloads, 5-ton lots, and smaller quantities, into Paragraph 9, Count Two of Section III, by reference. Sherwin, therefore, by reference, reaffirms and incorporates hereat, each and every exception it has heretofore taken to specific statements by the Trial Examiner relative to the evidence bearing upon the aforementioned subjects and relies upon the same citations which it has heretofore identified with each such specific exception.

72. Sherwin excepts to Paragraph 9-b of Section III, and to Paragraph 9-B, of the Recommended Decision in so far as the statements contained therein imply that such container differentials as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 210, CX 662-A, CX 662-W, Y, Z1, Z3, Z5, CX 800 A-C, Tr. 3882-3886).

73. Sherwin excepts to the first sentence in Paragraph 9-c of Section III, and in Paragraph 9-C of Section IV, of the Recommended Decision in so far as such sentences imply that such quality differentials on various grades of red lead as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 209, CX 782-C, CX 823-EF, Tr. 3870-3882).

74. Sherwin excepts to Paragraph 9-d of Section III, and to Paragraph 9-D of Section IV, of the Recommended

Decision for the reason that the statements contained therein do not correctly and accurately reflect Sherwin's pricing policy for carloads and smaller quantities of oxides, and neither the tabulation therein set forth nor the exhibits therein referred to by the Examiner are applicable in any way to Sherwin's pricing or freight policies for 1009 oxides. (Citations urged in support of the foregoing exception are the same as those relied upon in Exceptions 17, 21, 26, 27, and 28).

75. Sherwin excepts to the first sentence of Paragraph 9-e of Section III, and of Paragraph 9-E of Section IV, of the Recommended Decision in so far as such sentences might imply that such differentials as were utilized by Sherwin in connection with carload shipments are basic lead carbonate, were utilized as the result of any agreement or understanding with any other respondent herein or any one else, for the reason that the record does not disclose that Sherwin ever sold basic lead carbonate in carload shipments of 20 tons or more at one-quarter cent per pound less than its card prices for such products prior to 1942 (CX 823-G).

76. Sherwin excepts to Paragraph 9-f of Section III, and to Paragraph 9-F of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the record as a whole in so far as Sherwin's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 27, and 28; and also CX 662 I through R, U, V, Z9 through Z25; Tr. 1338-1480, 1672-2018, 4070.)

77. Sherwin excepts to Paragraph 10-a of Section III, and to Paragraph 10A of Section IV, of the Recommended Decision for the reason that the statements therein made are not supported by the record in so far as Sherwin is concerned and the exhibits cited by the Examiner have no relation whatever to Sherwin or its pricing practices. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 21, 26, and 27; Tr. 1338-1480, 1682-2018, 4070.)

78. Sherwin excepts to Paragraph 10-b of Section III, and to Paragraph 10-B of Section IV, of the Recommended Decision in so far as the Examiner fails to affirmatively state in such paragraphs that for over twenty years Sherwin has not manufactured or sold oxides for use by the battery manufacturing industry (Tr. 4070).

79. Sherwin excepts to Paragraphs 10-c and 10-d of Section III, and to Paragraphs 10-C and 10-D of Section IV, of the Recommended Decision for the reason that the Examiner fails to affirmatively state therein that the record does not disclose sales of dry white lead or dry
1010 red lead, the products under discussion in such paragraphs, by Sherwin to paint manufacturers generally or to the specific manufacturers whose testimony is outlined in such paragraphs (Tr. 1338-1480).

80. Sherwin excepts to Paragraph 10-c of Section III, and to Paragraph 10-C of Section IV, of the Recommended Decision for the reason that such paragraphs contain many statements which are either contrary to the evidence or are incomplete statements of the evidence. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480).

81. Sherwin excepts to Paragraph 10-d of Section III, and to Paragraph 10-D of Section IV, of the Recommended Decision, for the reason that the statements contained therein do not correctly and accurately reflect price differentials in effect in the area discussed in such paragraphs. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480).

82. Sherwin excepts to Paragraph 10-f of Section III, and to Paragraph 10-F of Section IV, of the Recommended Decision for the reason that the statements contained therein are unsupported by the record in so far as Sherwin is concerned in that it has not employed zone prices and has not employed quantity, quality and container differentials as a result of any understanding or agreement with any of the other respondents herein. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39, and 40).

83. Sherwin excepts to the first sentence of Paragraph 10-g of Section III, and of Paragraph 10-G of Section IV, of the Recommended Decision in so far as such sentences indicate that Sherwin's pricing practices involve a delivered price which is the same to all customers in a zone, regardless of distance, as not being supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40.)

84. Sherwin excepts to the last sentence of Paragraph 10-g of Section III, and of Paragraph 10-G of Section
1011 IV, of the Recommended Decision as not being a correct statement of the law. (Clayton Act, as amended, Sec. 2(a); Senate Committee Report 1502, dated February 3, 1936; *Corn Products* v. *F. T. C.*, 324 U. S. 726; *F. T. C.* v. *Staley*, 324 U. S. 746).

85. Sherwin excepts to Paragraph 10-h of Section III, and to Paragraph 10-H of Section IV, of the Recommended Decision, for the reason that in so far as Sherwin is concerned the record does not support a finding that such sales as it has made to customers differently located at different prices were discriminatory or had any competitive effect whatever. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480, 1672-2018, 4070.)

86. Sherwin excepts to Paragraph 10-j of Section III, and to Paragraph 10-J of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Sherwin's shipping or freight practices as disclosed in the record, and for the further reason that the record does not disclose that such quantity or other differentials as may have been used by Sherwin in the sale of oxides were discriminatory or had any adverse competitive effect whatever between its various customers. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 26, 27, and 28; also Tr. 1338-1480, 1672-2018).

87. Sherwin excepts to Paragraph 10-k of Section III, and to Paragraph 10-K of Section IV, of the Recommended Decision in so far as such paragraphs indicate that Sherwin sold basic lead carbonate at a one-quarter cent differential between carload and less than carload lots prior to 1942 (CX 823-G).

88. Sherwin excepts to the first sentence of Paragraph 10-l of Section III, and of Paragraph 10-L of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the record in so far as Sherwin's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 27 and 28; also CX 662 I through R, U, V, Z9 through Z25, Tr. 1338-1480, 1672-2018, 4070).

1012 89. Sherwin excepts to the first and last sentences of Paragraph 10-m of Section III of the Recommended

Decision in so far as the Examiner characterizes the practices described in Paragraphs 10-h and 10-j as involving discriminations for the reasons set out in connection with exceptions 85 and 86. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 26, 27 and 28; also Tr. 1338-1480, 1672-2018, and 4070.)

90. Sherwin excepts to the third sentence of Paragraph 10-m of Section III of the Recommended Decision in so far as it states that Sherwin has cooperatively employed discriminatory practices or other methods which produce prices which are identical with those of each of the other respondents, for the reason that such statements are not supported by the record as a whole.

91. Sherwin excepts to Paragraphs 11-a and 11-b of Section III, and to Paragraphs 11-A and 11-B of Section IV of the Recommended Decision for the reason that the statements contained therein are not supported by the record and constitute an incorrect statement of the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *F. T. C.* vs. *Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

92. Sherwin excepts to that portion of the seventh sentence in the third subparagraph of Paragraph 11-c of Section III of the Recommended Decision which reads "in the absence of uneconomic or unlawful factors", for the reason that such statement is unwarranted under the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *F. T. C.* vs. *Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

93. Sherwin adopts as its own each and every exception taken by each other respondent to Sections II, III and IV of the Recommended Decision and incorporates herein, by reference, each such exception together with all citations in support thereof; provided, however, that this exception shall not control in the event there should be a conflict between any specific exception taken by Sherwin, as set out in exceptions 1 through 92, inclusive, and any exception taken by another respondent.

1013 94. Sherwin excepts to the Examiner's failure to report and to recommend a finding relative to its special defenses as follows:

"Sherwin has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by any other respondent. The various respondents have different delivery costs in shipping lead pigments to their respective customers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin have a freight advantage over Sherwin. In that portion of the United States closer to Chicago, freightwise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an equal footing freightwise. Since Sherwin's only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage. National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for the Commission as the 'normal period' from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 35% of the dry white lead and 50% of the red lead and litharge. Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California. It produces red lead and litharge in plants located in Brooklyn, New York, Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia, and Los Angeles and San Francisco, California. For the period from 1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead. The figures for Eagle do not include its production of lead sulphate, which is used extensively by it interchangeably with basic carbonate and which substantially exceeds its production of basic carbonate. Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey. In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead. It produces red lead and litharge at Hammond, Ind., which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania. In the period from 1937-1943

International Smelting & Refining Company sold from
1014 3% to 4% of the white lead in oil and from 10% to
19% of the dry white lead. These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Co. discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead. Sherwin prepared and introduced in evidence as RX 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of carload and less than carload railroad freight rates in effect on January 15, 1941. An examination of this exhibit clearly shows that National Lead's Cleveland, St. Louis and Philadelphia plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant at Scranton, Penna. has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin all have the same freight advantage in an area surrounding Chicago. The net result is that Glidden has a freight advantage in some territory, Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin's sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil) was introduced as R.X. 200. The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically

placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago over St. Louis, Missouri; Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin has only six shipping points (Detroit, Indianapolis, Minneapolis, Chicago, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (either white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin's plant at Chicago. In those instances where Sherwin ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents." (CX 578, 664, 741, 882-J, RX 199, RX 200; Tr. 1071-1072, 1230-1233, 1307-1308, 1552, 1560-1561, 1564, 1625, 1647, 1665-1666, 3721-3732, 3732-3740.)

C. In so far as Section V, entitled "Recommended Order", of the Trial Examiner's Recommended Decision is concerned, Sherwin takes the following exceptions:

95. Sherwin excepts to Paragraph 1, including subparagraphs 1-A, 1-B, 1-C and 1-D, for the reason that the weight of the reliable, probative and substantial evidence in the record does not show that Sherwin has entered into, cooperated in or carried out any planned common course of action, understanding, agreement, combination or conspiracy to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, or to induce resale price uniformity in connection with the sale and distribution of lead pigments.

96. Sherwin excepts to Paragraph 4, including subparagraphs 4-A and 4-B for the reason that the weight of

the reliable, probative and substantial evidence in the record fails to disclose (1) that Sherwin has sold lead pigments at different zone delivered prices to customers located in different zones who are in competition with each other; (2) that Sherwin has sold lead oxides at dif-
1016 ferent quantity price differentials between carload and 5 ton shipments and between 5 ton and smaller shipments to customers who are in competition with each other, or (3) that even if Sherwin had engaged in the practices hereinabove described in (1) and (2), which is not admitted, any detrimental competitive effect has been shown in the record.

97. Sherwin excepts to Items 1, 2 and 4 of the Recommended Order for the reason that each and every provision thereof is contrary to both the evidence in the record and to the provisions of the Federal Trade Commission Act and of the Clayton Act, as amended by the Robinson-Patman Act.

D. With respect to the Trial Examiner's Rulings on Proposals for Findings and Conclusions submitted by Sherwin under Rule XXI of the Commission's Rules of Practice, specific exceptions are taken as follows:

98. Sherwin excepts to the Examiner's denial of the findings requested in Paragraph One relating to Count I.

99. Sherwin excepts to the Examiner's denial of the findings requested in Paragraph Two relating to Count I.

100. Sherwin excepts to the Examiner's ruling in deleting the word "negligible" in the third sentence of Paragraph Five relating to Count I.

101. Sherwin excepts to the Examiner's refusal to grant the Finding stated in the fourth sentence of Paragraph Five relating to Count I, which reads "It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state". Sherwin has never denied that it is engaged in interstate commerce but contends that the particular phase of its business therein described is not interstate commerce and that sales made by it in its local retail stores are not subject to the jurisdiction of the Commission.

102. Sherwin excepts to the manner in which the Examiner has ruled on the proposals contained in Paragraphs Six, Seven, Eight, Nine, Ten, Eleven and Twelve relating to Count I, and in Paragraphs One through Fourteen relating to Count II, for the reason that the Examiner's rul-

ing does not comply with the requirements of Rule
1017 XXI and does not furnish it with the specific information contemplated by the rule as to which requested findings were denied in toto, which were denied in part and modified, which were not ruled upon at all or which were adopted in whole or in part. While Sherwin has attempted to take specific exceptions to the many findings in the report which are contrary to findings requested by it, it has has been possible, in some instances to determine just what action has been taken by the Examiner with respect to specific findings requested by it. Consequently Sherwin finds it necessary, due to the character of the Examiner's rulings, to except to the failure of the Examiner to make each and every finding specifically requested in each of the above enumerated paragraphs of its proposed findings and for such purpose incorporates the proposed finding submitted by it herein by reference. (In support of such exception Sherwin relies upon the record and exhibit citations set out in detail in connection with each of such requested findings.)

103. Sherwin excepts to the Examiner's denial of conclusion of law number 1 as requested by it and reasserts that the mere fact that it is engaged in interstate commerce is not a sufficient basis, in law, for the denial of the conclusion of law requested.

104. Sherwin excepts to the Examiner's denial of conclusion of law number 2 requested by it and reasserts that the proposed conclusion is a sufficient statement of the law on the point.

105. Sherwin excepts to the Examiner's denial of conclusion of law number 3 requested by it and reasserts that the conclusion requested is a proper statement of the law on the point.

106. Sherwin excepts to the Examiner's partial denial of conclusion of law number 4 for the reason that the proposed conclusion properly states the law, and for the further reason that the definition of the term "price" requested in such conclusion has no relation whatever to zones.

107. Sherwin excepts to the Examiner's denial of conclusion of law number 5 requested by it for the reason that it constitutes a proper statement of the law on the point and for the further reason that the criterion as to whether there has been a violation of the Clayton Act is not difference in

price but discrimination in price, plus a detrimental competitive effect.

1018 108. Sherwin excepts to the Examiner's denial of conclusions of law 6, 7, 8 and 9 requested by it for the reason that the denial thereof is contrary to both the evidence and the law.

Respectfully submitted this 21st day of May, 1948.

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* * * * *

1045 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

(Received May 25, 1948.)

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called "Eagle-Picher") by their attorneys, Edmund P. Wood and Richard Serviss, and adopt as their own the exceptions taken by each other respondent herein to the "Trial Examiner's Recommended Decision".

A. In view of the fact that the Recommended Decision of the Trial Examiner treats the practices of Eagle-Picher as incidental or tributary to those of National, thus dispersing direct and indirect reference to them throughout the Recommended Decision, and rendering it difficult to challenge each allusion to Eagle-Picher separately and individually, Eagle-Picher asserts the two following general exceptions to the Trial Examiner's Recommended Decision:

1. As to Count I, the Trial Examiner erred in holding or insinuating that National lawlessly achieved a monopolistic position of industrial dominance, that Eagle-Picher
1046 aided, abetted, supported, and contributed to National's monopolistic delinquency and now partici-

pates in the illegal fruits as virtual co-partner in criminal monopoly, that National procured this sinister intimacy by the device of its erstwhile minority stock ownership in Eagle-Picher, and that these conclusions are compelled by the manifest intimations of the evidence, in weighing which the categorical statements of top executives, whose honesty is not questioned, must be disregarded as unqualified, in favor of possible inferences emanating from the extraneous doings and scrivenings of underlings, which, although irrelevant, should be regarded as transcending normal competitive amenities. Eagle-Picher excepts to and objects to each and every item which holds, insinuates, implies, suggests, infers, or intimates to this general effect, positively or negatively, or both.

Reason: The Trial Examiner so erred because he chose to ignore the testimony offered on behalf of Eagle-Picher, and because he disregarded the established law of evidence that inferences cannot be used to contradict direct and positive testimony, unless they are inescapable. More particularly, it was testified that Eagle-Picher had no agreements with National and competed with it actively but had no alternative to following National's prices on products made from pig lead, because Eagle-Picher was not relatively strong enough to start or finish a price war. This direct and positive testimony, which is more particularly identified below in Paragraphs B-1, 2, 3, and 4, stands uncontradicted in the record, and the Trial Examiner's laborious deduction of intricate and sinister conspiracy is completely unnecessary to explain the transparently simple, com-
1047 monplace competitive situation. (See Paragraphs (1-f), on Page 10; (7-c1), on Page 43; (6-A), on Page 79; and (7-A1), on Page 80, of the Trial Examiner's Recommended Decision.)

2. As to Count II, the Trial Examiner erred in that, after holding that the price discriminations of the respondents should be treated individually (Page 57, Paragraph (10-m)), he concluded that Eagle-Picher was violating Section 2(a) of the Clayton Act, without making the appropriate and necessary findings of fact as to Eagle-Picher. More specifically, the Examiner held:

"The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers."

However, the Recommended Decision contains no finding that any two or more actual customers of Eagle-Picher were affected by Eagle-Picher's price differentials or that anything more specific than hypothetical competition between hypothetical customers might be affected. The Recommended Decision goes beyond due process of law in recommending a restraining order against Eagle-Picher, in the absence of a clear-cut finding that Eagle-Picher's individual pricing practices substantially affected the competition between identifiable customers.

Reason: At the close of the Commission's case, Eagle-Picher moved to dismiss the complaint, on the ground, among others, that the evidence in respect to violation of Section 2(a) of the Clayton Act was too vague and indefinite to permit proper defense or rebuttal and hence, Eagle-Picher, denied opportunity for intelligent defense, 1048 was being deprived of due process of law. The proposed finding that Eagle-Picher has violated this Act is unsupported by any finding as to when, where, how, or whom. If Eagle-Picher's price differentials have substantially lessened competition among its customers, or if their effect may be to substantially lessen competition, then certainly the Recommended Decision should have identified the customers so affected with sufficient particularity to permit Eagle-Picher to at least argue the matter before the Commission.

The record indicates throughout that Eagle-Picher has many customers, and that there is much competition in at least several of the industries in which Eagle-Picher customers engage. The Trial Examiner speculated academically as to hypothetical effects on hypothetical customers, but did not instance from the record any proved violation of law. As basis for the Recommended Order, the Recommended Decision should have found that the effect of Eagle-Picher pricing practice X may be to substantially lessen competition between Eagle-Picher customers A and B. There should have been such a finding in respect to each pigment and each price differential. Instead, the Trial Examiner merely found that the effect of the Eagle-Picher differentials was to maybe lessen competition. In short, the Recommended Decision in substance substitutes "maybe" for "may be" in the statute, which renders defense impossible, and denies Eagle-Picher due process of law.

B. Further, Eagle-Picher excepts to the refusal of the Trial Examiner to make the following findings of fact, pro-

posed to him by Eagle-Picher, and supported by the evidence:

1049 1. "The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called Eagle-Picher) engage in the business of selling lead pigments in interstate commerce throughout the United States in which business they are second in size to National Lead Company (hereinafter called National). Due to the difference in sizes of the two companies, Eagle-Picher is not in a position to compete with National, on lead pigments manufactured from pig lead, by means of a general policy of price cutting or price war. Nevertheless, it is the policy of Eagle-Picher to compete with National in the sale of lead pigments and Eagle-Picher does so compete actively by means of research which develops different and better products, by means of sales service, by means of technical service to customers providing them with the benefit of Eagle-Picher's research facilities, and by means of national advertising intended to increase consumer acceptance of the Eagle-Picher products."

2. "Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, president of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices or terms or conditions of sale of lead pigments, and this testimony is uncontradicted."

3. "Particularly, Eagle-Picher research has developed special pigments known as basic lead sulphate, leaded zinc oxide and blue lead which Eagle-Picher manufactures
1050 from its own raw materials and sells in competition with pigments manufactured from pig lead. All of the Eagle-Picher organization has been actively engaged in promoting consumer acceptance and greater utilization of these products in competition with those promoted by the other respondents herein."

4. "Eagle-Picher's research laboratories have developed many special lead oxides for the storage battery industry and Eagle-Picher's technical experts have instructed

the company's customers in the manner of their use, which has improved the competitive position of the Eagle-Picher customers in relation to that of the customers of National and that of the large battery manufacturers which produce their own lead oxides."

5. "Eagle-Picher has not indulged in any unfair method of competition by conspiracy or otherwise."

6. "Eagle-Picher has not discriminated among its customers in its sale of lead pigments."

7. "Eagle-Picher cannot compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants."

8. "The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect."

9. "The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect."

1051 Reasons: Eagle-Picher's proposed exceptions Nos. 1, 2, 3 and 4, are supported by the testimony of Alvin C. Goetz, Tr. 3328; Harold R. Harner, Tr. 3416; M. F. Chubb, Tr. 3462; W. W. Vasterling, Tr. 3591; J. O. Mitchell, Tr. 3620, J. M. Bowlby, Tr. 3632-A; and W. H. Hayt, Tr. 3659.

Proposed findings Nos. 5 and 6 are negative in form and are supported by the negative aspects of the record. Proposed finding No. 7 may be found in substance in the Recommended Decision, but the Trial Examiner refused to make this proposed finding with quotable conciseness. Proposed findings Nos. 8 and 9 are negative, and are predicated upon the negative aspects of the record.

C. More specifically, Eagle-Picher excepts to said Recommended Decision in the following particulars:

1. Page 6, under "The Issues":

"Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?

Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?

Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?"

The reason for the exception is that none of these activities comes under Section 5 of the Federal Trade Commission Act, or Section 2(a) of the Clayton Act, or under any other statute under which the Federal Trade Commission has jurisdiction. These issues might pertain to
alleged violation by National of Section 2 of the Sher-
1052 man Act, but the Federal Trade Commission is without power to enforce this section of the Sherman Act, in so far as mere purpose or intent to monopolize is concerned, because intent per se is not an unfair method of competition. These issues, properly, have nothing to do with the Eagle-Picher respondents; Eagle-Picher is not responsible for the sole and long past actions of National, and should not be prejudiced by these false issues relating solely to National.

2. Page 9, (1-e)

This paragraph is faulty, in that Eagle-Picher's production of basic lead sulphate and leaded zinc oxide is not taken into account, and further, in that the record does not justify the holding that Eagle-Picher's percentage of business has been increased by its acquisition of International's lead pigment plant. Eagle-Picher did not buy International's business, and there is no reason to believe that Eagle-Picher received a larger share of it than any other respondent.

3. Page 10, (1-f)

Properly, these facts, if true, are not pertinent to the issues of this case. The statement that it was not shown that National controlled Eagle-Picher through stock ownership is warranted, but this finding alone should disqualify all other evidence pertaining to National's financial interest in Eagle-Picher. The evidence which is discussed in the second paragraph of (1-f) is too trifling for proper consideration in relation to any valid issues in the case.

4. Page 35, (5-e)

The record does not justify the interpretation placed upon it as to Eagle-Picher.

1053 5. Page 36, (6-a)

There is nothing in the record to justify the Examiner's implication that prices were fixed jointly by Na-

tional and Eagle-Picher. Eagle-Picher does not except to the finding that the prices set by National "had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get (Pars. 1-f, 2-f, 5-c3)."

6. Page 38, (7-a1) and (7-a2)

These conclusions have nothing to do with any proper issue in the case, as explained in relation to the analysis of "Issues".

7. Page 39, (7-a3)

There is nothing in the record to show that "Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale." Eagle-Picher in general followed National's pricing, as to products made from pig lead, but did not "promulgate" the pricing system. The acquisition is without evidentiary support.

8. Page 40, (7-a7)

This statement is inaccurate, because it does not take into account Eagle-Picher's sale of basic sulphate white lead and blue lead, which competed against National's basic carbonate white lead and red lead, respectively.

9. Page 40, (7-a8)

There is nothing in the record to show that the Eagle-Picher respondents "discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies." Paragraph 15-c7), to which the Examiner refers in (7-a8) comprises only an analysis of invoices, and provides no basis for the Trial Examiner's unsupported charge that discussion of quotations in sealed bids took place. There is no such evidence in the record.

1054

10. Page 40, (7-b1)

Eagle-Picher has always admitted following generally the price leadership of National in respect to prices and terms and conditions of sale, of most of its products. There is no evidence in the case to warrant the inference that these prices and terms and conditions of sale were arrived at by collusion between National and Eagle-Picher. The evidence is to the contrary, and is designated with particularity in the exceptions to the Trial Examiner's refusal to make the findings requested by them.

11. Page 43, (7-c1)

The conclusions stated in this paragraph are excepted to for the reasons set forth in the exception to Paragraph (7-b1).

12. Page 44, (7-c4)

There is no evidence in this record as to what an unrestrained marketing system would provide in the way of price variation for the purposes of bargain and sale. In an industry in which price leadership obtains, some conformity in pricing is to be expected; the assumption to the contrary is without judicial sanction, and must be predicated upon some undisclosed, obscure, out-moded text on economics, of which these respondents have no knowledge.

1055 13. Page 44, (7-c5)

Inasmuch as the Miller-Tydings Act legalizes the fixing of resale prices, it is not within the province of the Federal Trade Commission to condemn under the Federal Trade Commission Act those who sought and obtained a legal result. A legalized method of competition cannot be an unfair method of competition. After the Miller-Tydings Act was passed, the Commission altered many orders previously issued.

14. Page 44, (7-d1)

The suspension of the enforceability of Schedule A and Article VII, Section 2, of the N. R. A. Code was without legal significance as to those who voluntarily adopted the practices approved therein.

15. Page 45, (7-d2)

There was no conspiracy. The simpler and correct explanation of such conformity of prices, terms and conditions of sale as existed, insofar as Eagle-Picher is concerned, is that Eagle-Picher deliberately and purposefully followed the pricing policy of National as to products made from pig lead, which it had a right to do legally.

16. Page 45, (7-d3)

The delineated activities of National are not in violation of the Federal Trade Commission Act, because monopolistic purpose, even if proved, violates only Section 2 of the Sherman Act, and is not an unfair method of competition. Further, the Federal Trade Commission Act was intended to nip monopolistic tendencies in the bud, whereas the alleged improper conduct of National took place in the long past, and the issue itself is improper in this case.

1056 17. Page 45, (7-d4)

Eagle-Picher acted within its rights in following generally the pricing policies of the National Lead Company as to products made from pig lead.

18. Page 46 (7-d5) and (7-d6)

The conclusions stated in this paragraph are excepted to for the reasons asserted in the exception to Paragraph (7-54).

19. Pages 49 and 50, (8-a4)

This item is unsupported by either the record references therein made or any other portion of the record.

20. Page 56, (10-h)

The cases pointed out in Paragraphs 8-a3, a4, 10-a, and d, are not discriminatory in the sense in which the word is used in Section 2(a) of the Clayton Act, and the price differentials shown to exist were not shown to be substantial or to lessen competition between Eagle-Picher's customers.

21. Page 57 (10-j)

It is not shown that the price differences in question were discriminatory in the sense of Section 2(a) of the Clayton Act, that they were substantial, or that they had the tendency or effect of lessening competition between large and small customers, to the injury of the latter.

22. Page 57, (11-a)

The Trial Examiner erred in considering individual
sales to customers in premium zones, instead of con-
1057 sidering the zone price, that is, the average of all of
the transactions within the zone. Zone selling is legal. (*Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2d) 354). There is no showing that individual customers were damaged or put at a competitive disadvantage in competition with customers in a different zone.

23. Page 58, (11-b)

It is improper to hold that prices are discriminatory and violative of Section 2(a) of the Clayton Act, in the absence of proof that competition, in this case among customers, may be lessened.

24. Page 61, "IV. Recommended Findings and Conclusions"

This section of the Trial Examiner's Recommended Decision, that is, from Page 61 to Page 96, "Recommended Order", is essentially a repetition of the foregoing sections to which specific exceptions have been noted. Eagle-Picher particularly excepts to Page 81, (7-A3); Page 82, (7-A8); Page 84, (7-C1); Page 85, (7-D1); Page 86, (7-D2);

Page 87, (7-D5); Page 87, (7-D6); Page
age 92, (10-D); for the reasons previ-

ier excepts to the inclusion of the find-
, 2-A, 2-B, 2-C, 2-D, 2-E, 2-F, and 3,
s in the case, for the reasons described
ption No. 1.
-J)
cept to the recommended finding that
rcentage of the lead pigment business
d by its recent acquisition of Interna-
ent plan and business. The Trial Ex-
in error as to Eagle-Picher's acquiring
's business, because it did not, and there
the record to suggest that it did. Fur-
s nothing in the record to show that
uisition of International's plant in any
gle-Picher's business or percentage.
-K)
jects to the inclusion of the finding that
agle-Picher stock. In view of the finding
not control Eagle-Picher, the inclusion
he stock ownership is improper. Obvi-
xaminer was prejudiced by this circum-
exaggerated the importance of trivial
the companies itemized in said Para-
ularly, Eagle-Picher objects to the state-
her's files contained National's price
cific Coast", because there was just one
Eagle-Picher files, showing one change
nal on the Pacific Coast whereas the
ing intimates greater intimacy. Eagle-
ne characterization of the itemized trivia
e of close relations between these two
ne of the specified contacts between Na-
Picher personnel was improper, and all
ited number of casual and isolated law-
over fifteen years, is inadequate basis
nference that the parties were engaged
piracy.
6-A).
cepts to the first sentence of this para-
s National and Eagle-Picher as an en-
bjects to all casual insinuations through-
ke effect.

1059 28. Page 80, (7-A1).

Eagle-Picher excepts to the latter part of the first sentence, which asserts that National added to its dominant power by establishing close cooperation with Eagle-Picher. There is nothing in the record to show that Eagle-Picher cooperated with National to a degree greater than that compelled by the position of National which the Trial Examiner held to be dominant. Further, it is the strategy of the Trial Examiner, in his compounding of this paragraph, to tie Eagle-Picher into National's acquisition of competitors many years ago, and its historic relations with American Smelting and Refining Company. If National's early operations were improper, then Eagle-Picher, as its "largest potential competitor", was the chief victim. If National's early history here has any pertinency, then the Federal Trade Commission has been guilty of thirty years' gross dereliction, and the Trial Examiner's present attempt to implicate Eagle-Picher, as an incident to his condemnation of National, merely adds insult to injury. In short, the Trial Examiner's report is hopelessly inconsistent in every particular and respect, including every insinuation, as well as statement, by which it attempts to tie National and Eagle-Picher together as twin culprits. (See Paragraph 7-D-3 on Page 86.)

29. Page 82 (7-B1).

Eagle-Picher excepts to the statement in the first and last sentence as not supported by any evidence whatsoever. Eagle-Picher followed National's prices and terms and conditions of sale, because National was the price leader, but there is not one iota of evidence in the record that the prices and terms and conditions of sale resulted from joint action.

1060 30. Page 94, (10-H).

Eagle-Picher objects to the inference of this paragraph that it indulged in discrimination to substantially lessen competition between its customers. There is no evidence whatsoever in the record that any Eagle-Picher price differential substantially lessened competition between Eagle-Picher's customers, and Trial Examiner's Recommended Decision cites no such case.

31. Page 95, (11-A).

The zone system is legal, (*Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2d) 354.) and hence, the average zone freight is the critical factor in determining legality, rather than specific zone border ex-

amples. The record does not show any instance in which Eagle-Picher's customers, located in different zones, were in competition with each other, and none is suggested in the Trial Examiner's Recommended Decision.

32. Page 95, (11-B).

There is no instance of competition between Eagle-Picher's customers being substantially lessened by the quantity differentials referred to in said paragraph, and such quantity differentials are entirely legal.

1061 33. Page 95, (V. Recommended Order).

Eagle-Picher excepts to the order recommended by the Trial Examiner on the ground that each and every provision of it is unwarranted by both the evidence and the law.

Respectfully submitted,
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* * * * *

1082 BEFORE THE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

APPEAL TO COMMISSION FROM RULINGS OF THE TRIAL EXAMINER.

(Received Nov. 16, 1948.)

Comes now the respondent, National Lead Company, herein and by its counsel respectfully appeals to the Federal Trade Commission, pursuant to Rule XX of the Rules of Practice of this Commission, from the rulings of the Trial Examiner herein overruling objections of respondents to the introduction of certain exhibits, and hereby makes application that the Commission reverse the said

rulings of the Trial Examiner and strike the said exhibits from the record herein.

The facts supporting this application and the contentions of respondent with respect thereto are set forth in the attached brief.

Respectfully submitted,

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1083 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

BRIEF ON APPEAL TO COMMISSION FROM RULINGS OF THE TRIAL EXAMINER.

Statement.

At a hearing held on November 13, 1947, it was stipulated and agreed by and between counsel for the Commission and counsel for the respondents that, subject to the approval of the Commission, the requirements of Rule XX of the Rules of Practice of the Commission to the contrary notwithstanding, motions for reconsideration and reversal of rulings of the Trial Examiner admitting or excluding testimony or evidence, and appeals to the Commission from such rulings, should be made to the Commission at the time of briefing and arguing the case to the Commission on the merits, and that no party should be deemed thereby to have waived any objection or any exception to such ruling or right to urge such objection or exception to the Commission at the time of the argument. It was expressly stated that the purpose of the stipulation was to expedite the determination of this matter before the Trial Examiner and the Commission (Tr. 4073-74). This stipulation was approved by order of the Commission dated November 18, 1947.

The Trial Examiner stated that an automatic exception would be granted to every ruling upon objection and that all respondents would have the benefit of objections by and exceptions to any one respondent (Tr. 3-4, 529-30).

1084 In this brief we shall enumerate the exceptions, the exhibits objected to, and the transcript page numbers of the objections taken, and shall set forth the reasons supporting our contention that the rulings of the Trial Examiner admitting such exhibits should be reversed and the exhibits stricken from the record.

A. Exceptions to N. R. A. Exhibits

Exception No.	Exhibit No.	Objection
1	Com. Ex. 711	Tr. 691
2	Com. Ex. 799)	Tr. 1023, 1024
3	Com. Ex. 800 A-C)	
4	Com. Ex. 801 A-B)	
5	Com. Ex. 802 A-B)	
6	Com. Ex. 803)	
7	Com. Ex. 804)	
8	Com. Ex. 805 A-C)	
9	Com. Ex. 501 A-D	Tr. 1049
10	Com. Ex. 502 A-C	Tr. 1050
11	Com. Ex. 504 A-B	Tr. 1050
12	Com. Ex. 505 A-B	Tr. 1051
13	Com. Ex. 506 A-F	Tr. 1052
14	Com. Ex. 507 A-M)	Tr. 1052-53
15	Com. Ex. 508 A-D)	
16	Com. Ex. 510 A-I)	
17	Com. Ex. 511 A-E)	
18	Com. Ex. 513 A-E	Tr. 1054
19	Com. Ex. 514 A-H	Tr. 1055
20	Com. Ex. 515 A-K	Tr. 1056
21	Com. Ex. 516 A-C	Tr. 1057
22	Com. Ex. 517 A-D	Tr. 1057
23	Com. Ex. 518 A-B	Tr. 1058
24	Com. Ex. 519 A-B	Tr. 1058
25	Com. Ex. 520 A-B	Tr. 1059
26	Com. Ex. 521 A-B	Tr. 1059
27	Com. Ex. 522 A-I	Tr. 1059
28	Com. Ex. 523	Tr. 1060
29	Com. Ex. 524 A-E	Tr. 1060, 1061

1085 These documents, consisting of minutes of a number of meetings of the various committees of the Lead Pigments Division of the Lead Industries Association held during the period 1933-1934, and related documents, were all objected to upon the ground that they were N. R. A. documents and thus could not be made the basis of a charge of conspiracy in violation of Section 5 of the Federal Trade Commission Act. The stated objections are supported by the following authorities:

Section 5, National Industrial Recovery Act, 48 Stat. 195, 198;

Eugene Dietzgen Co. v. *Federal Trade Com'n*, 142 F. 2d 321, 329 (C. C. A. 7th, 1944), cert. den. 323 U. S. 720;

Allied Paper Mills v. *Federal Trade Commission*, 168 F. 2d 600, 605 (C. C. A. 7th, 1948);

Aetna Portland Cement Co. v. *Federal Trade Com'n*, 157 F. 2d 533, 549 (C. C. A. 7th, 1946);

Trade Comm'n v. *Cement Institute*, 333 U. S. 683, 704-705 (1948).

In the event that the Commission reverses the Trial Examiner's rulings with respect to this evidence introduced by counsel for the Commission and strikes the said exhibits from the record, respondent consents that the following N. R. A. exhibits introduced by it, in explanation of the documents introduced over respondents' objection by counsel for the Commission, also be stricken from the record:

Resp. Ex. 6 A-I
Resp. Ex. 7 A-C
Resp. Ex. 8 A-B
Resp. Ex. 9 A-F
Resp. Ex. 11 A-F
Resp. Ex. 12
Resp. Ex. 13 A-D
Resp. Ex. 127 A-G
Resp. Ex. 128 A-E
Resp. Ex. 129 A-X
Resp. Ex. 130 A-H
Resp. Ex. 131 A-G
1086 Resp. Ex. 132 A-T
Resp. Ex. 133 A-Z-7
Resp. Ex. 134 A-E

Resp. Ex. 135 A-B
Resp. Ex. 136 A-B
Resp. Ex. 137 A-B
Resp. Ex. 138 A-B
Resp. Ex. 139

B. Exceptions to Other Exhibits

Exception No.	Exhibit No.	Objection
30	Com. Ex. 624 C	Tr. 561, et seq.

This was a memorandum signed by one Diemont, allegedly an agent of National Lead Company, and was admitted on condition that it was shown that Diemont was such an agent as to bind National Lead Company by his statements (Tr. 566). No such showing was made. The exhibit was objected to upon the ground that it was not shown who Diemont was and therefore the document should be stricken. In any event, Com. Ex. 624 A-B shows that the agency of Diemont, whatever might have been its nature, was terminated prior to his execution of the document admitted.

Exception No.	Exhibit No.	Objection
31	Com. Ex. 525	Tr. 601-02

This was a letter from National Lead Company to The Sherwin-Williams Company of Canada, Ltd., dated December 14, 1933, enclosing a price announcement to the trade. This exhibit was received subject to connection (Tr. 602) and no evidence connecting Sherwin-Williams Company of Canada, Ltd. with any respondent was ever offered. The objection was that the document was obviously without the scope of this proceeding and irrelevant and the objection should have been sustained.

1087

Exception No.	Exhibit No.	Objection
32	Com. Exs. 691, 692	Tr. 672

These were letters in 1940 between certain employees of Eagle-Picher Company and National Lead Company, relative to increasing the Federal Specifications for flatting oil, a product not involved in this proceeding. The docu-

ments were objected to upon the ground that they were irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
33	Com. Exs. 696, 697	Tr. 675

These were letters in 1937 between Dice, Executive Vice-President of Eagle-Picher Company, and Wormser of Lead Industries Association, relating to a luncheon at which Wormser had introduced Dice to Messrs. Wilson and Martino of National Lead Company, and at which "policies" of National Lead Company and Eagle-Picher Company were discussed. This was admitted subject to connection (Tr. 675) and no evidence showing such connection was offered. Objection was made upon the ground that the documents were irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
34	Com. Ex. 701	Tr. 682

This was a wire on March 12, 1941 from Scott of the Pacific Coast Branch of National Lead Company to Eagle-Picher Company, Cincinnati, Ohio, relative to a change in the Manila (Philippine Islands) prices of white lead in oil and dry red lead. The exhibit was objected to upon the ground that it was wholly irrelevant and the objection should have been sustained.

Exception No.	Exhibit No.	Objection
35	Com. Exs. 708 and 710	Tr. 689

1088 These exhibits were letters exchanged between Hayt of Eagle-Picher and Reque of National in July, 1940, relating to a new white lead paint which Eagle-Picher was trying out and which was very much on an "experimental basis". Among other things, the letter from Hayt of Eagle-Picher (Com. Ex. 710) sets forth the list price at which Eagle-Picher would attempt to market the product. The reply from Reque (Com. Ex. 708) merely expresses appreciation for the letter and Reque's wishes to Hayt for the best of luck. Since the exhibits referred

to a ready-mixed paint and not lead pigments, the objection made on the ground that the documents were irrelevant should have been sustained.

Exception No.	Exhibit No.	Objection
36	Com. Exs. 797 C-Z-6, 533, 534, 535, 577 A-C	Tr. 946 Tr. 948

Com. Ex. 797 C-Z-6 consisted of certain contracts between National and duPont de Nemours Co., Inc., and certain cost data of duPont's relating to the contracts, whereby duPont was to supply all of the raw materials which National was to convert into white lead in oil, title to all of which was to remain in duPont at all times. The other exhibits constitute correspondence relating to these contracts. The objections to these documents upon the ground that they were wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
37	Com. Ex. 538	Tr. 1103

This was a letter from Mr. Rowe of National to Reque of National's Chicago office, dated April 8, 1941, in which Rowe referred to certain preceding correspondence relating to cash discounts and then stated that he noticed an article in the Oil, Paint and Drug Reporter "in which the duPont Company announces a change in their policy"
to take effect on and after May 1. The letter con-
1089 tinued, "Perhaps those in the industry will follow this good example which would make it possible for us to do likewise without too much disturbance among our dealers". The objection upon the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
38	Com. Ex. 808 A-N	Tr. 1130, et seq.

This exhibit consisted of certain pages from the Oil, Paint and Drug Reporter of certain selected dates in May, June and August, 1934. The testimony of Mr. Auchincloss, President of the corporation which published the

Oil, Paint and Drug Reporter, showed that the statements therein contained were purely reportorial hearsay (Tr. 1112, 1116, 1134-38). The objection on the ground that the document was irrelevant, incompetent, and immaterial, and purely hearsay as to respondents, should have been sustained.

Exception No.	Exhibit No.	Objection
39	Com. Ex. 22A-Z-47	Tr. 971-72

This exhibit consisted of an alleged history of American Smelting & Refining Company up to about 1914, which had been prepared for his own use by a former employee of that company. It was not an official record of American Smelting & Refining Company, nor was it prepared by an officer of that company in the due course of business (Tr. 38, et seq.). The objection upon the ground that the document was incompetent, irrelevant and immaterial, and purely hearsay as to respondents, should have been sustained.

Exception No.	Exhibit No.	Objection
40	Com. Ex. 92	Tr. 967-69

This exhibit was a report prepared by the majority of the members of a committee of stockholders of American Smelting & Refining Company on an un-
1090 identified investigation of the affairs of the American Smelting & Refining Company. The objection upon the ground that the document was purely hearsay, irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
41	Com. Ex. 93 A-I	Tr. 978

This was a contract executed between American Smelting & Refining Company and National in 1906 relating to pig lead purchases by National from American Smelting & Refining Company, and on its face the document shows that it expired in 1921. The objection upon the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
42	Com. Ex. 94 A-G	Tr. 978

This was a contract executed in 1906 between American Smelting & Refining Company and Hoyt Metal Company, referring to the purchases by the latter company of antimonial lead from American Smelting & Refining Company. The objection on the ground that the document was wholly irrelevant and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
43	Com. Exs. 101, 103, 104 A-B, 105, 107, 108, 113, 118, 123, 136, 147, 158, 160, 173, 235, 238, 247, 270, 288, 309, 323, 336, 243, 365, 381, 388, 390, 393, 401, 409 A-B, 410, 411, 425, 428, 460, 476 A-B, 480, 481 A-B, 482, 483, 489, 490, 491, 492	Tr. 1206-07 Tr. 2041-45

1091 These exhibits consisted of certain monthly and sixty-day contracts executed between American Smelting & Refining Company, on the one hand, and National, Eagle-Picher and Sherwin-Williams, respectively, on the other hand, relating to purchases of pig lead from American Smelting & Refining Company, as well as correspondence relating to such contracts. The objections on the ground that the documents were wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
44	Com. Ex. 493 A-G	Tr. 1208

This was a contract between American Smelting & Refining Company and the Clayton Silver Mines, apparently a mining company but not identified anywhere in the record. The objection upon the ground that the document was wholly irrelevant, incompetent and immaterial should have been sustained.

Exception No.	Exhibit No.	Objection
45	Com. Exs. 25, 27, 28 and 29	Tr. 2048-52

These exhibits consisted of correspondence between Morton Trust Company and American Smelting & Refining Company written in 1906. The objection that the docu-

ments were wholly irrelevant, incompetent and immaterial, and purely hearsay, should have been sustained.

Exception No.	Exhibit No.	Objection
46	Com. Exs. 527, 528	No. 4193, et seq.

These exhibits consisted of letters written in 1935 by one Chatfield to officials of National. The testimony of Chatfield reveals that he was trying to work up a deal to sell stock of Eagle-Picher to National but that nothing came of the deal (Tr. 177). The objection to the doc-
1092. uments upon the ground that they were incompetent, irrelevant, immaterial and purely hearsay was originally sustained (Tr. 594). The Trial Examiner stated that the Commission would have the chance later to offer connecting proof. None was offered, although later the documents were admitted over the same objection (Tr. 4197). The objection, therefore, should have been sustained.

Conclusion.

The rulings of the Trial Examiner admitting the exhibits above-listed over respondents' objections should be reversed and the exhibits should be stricken from the record.

Respectfully submitted,
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James D. Ewing,
Of Counsel.

Dated, November 16, 1948.

1094 BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—5253) • •

APPEAL BY THE SHERWIN-WILLIAMS COMPANY FROM RULINGS OF TRIAL EXAMINER.

(Received Nov. 16, 1948.)

Comes now The Sherwin-Williams Company, one of the respondents herein, by its attorneys, and, pursuant to Rule XX of the Commission's Rules of Practice (except to such extent as compliance therewith was waived by Commission order of November 18, 1947), appeals to the Commission from adverse rulings made by the Trial Examiner in the course of the hearings herein relative to the admission of documentary evidence and parol testimony, to which objection was seasonably taken. In support of such appeal Sherwin relies upon the following assignments of error on the part of the Trial Examiner.

1. The Examiner erred in receiving in evidence Commission's Exhibit 525 (Tr. 603). This exhibit is a copy of a letter dated December 14, 1933 from National Lead
1095 Company to Sherwin-Williams Company of Canada, Ltd., enclosing a price card mailed to the trade relative to a price change for dry white lead and basic sulphate in lots of less than twenty tons. When this document was offered in evidence the Examiner, after objections had been interposed, stated, "I will receive it subject to connection." (Tr. 602). No connection was ever attempted. There was no showing as to the extent, if any, to which there was any control over the addressee by the respondent Sherwin; that the information contained therein was transmitted to respondent Sherwin or that any relationship other than that of seller and purchaser existed between National Lead Company and the addressee. In view of the foregoing, it is obvious that the relevancy of such document to this proceeding has not been established and the required connection has not been forthcoming.

2. The Examiner erred in receiving in evidence Commission's exhibit 594-AB. (Tr. 829). This exhibit shows the price differentials in effect for Sherwin's stores and warehouses on May 21, 1942. It is a duplicate of Commission's exhibit 662-S and T. (Tr. 831). On appeal we

would make no point of such duplication were it not for the remarks made by Counsel for the Commission at the time objection was made to such duplication of exhibits. Before the hearings commenced counsel for Sherwin were requested to stipulate that certain photostats sup-
1096 plied by counsel for the Commission were authentic and genuine copies of documents issued by Sherwin. This was agreed to and the stipulation was read into the record. (Tr. 275-281). Among such documents were Commission's Exhibits 662-S and T. Later, other photostatic copies of the same document were marked as Commission's Exhibits 594-A and B (Tr. 316-317) and were offered in evidence. (Tr. 828). Objection was interposed on the ground that such documents were duplicate photostatic copies of Exhibits 662-S and T. (Tr. 828-829). Then Counsel for the Commission (Mr. Wright) stated, "* * * but, furthermore, the identification of 594-A and B distinguished it from the identification of 662-S". (Tr. 829). Further, Counsel for the Commission (Mr. MacIntyre) stated, "As to the significance of the documents, the difference is set forth in connection with the record identification of the two" (Tr. 829) and "but from different people and under different circumstances, and there is a factual showing in the record that distinguishes them" (Tr. 830). Counsel for the Commission are thus apparently contending that there was some malevolent significance to be attached to the different sources from which the exhibits were alleged to have been obtained. There were no two sources. There was only one and any contention otherwise is ridiculous. A simple physical comparison of the photostats which are Commission's exhibits 594-A and 662-S will readily demonstrate the single source. When R. T. Dunn interviewed Mr. Shindler of Sherwin on December 23, 1943, he
1097 obtained one printed copy of the list dated May 21, 1942 and marked it Exhibit E to his interview. Thereafter we dealt only with different sets of photostatic copies of the one document furnished by Mr. Shindler. The foregoing exception is taken only for the purpose of attempting to clear the record from any improper implications arising through remarks of Counsel for the Commission, who insisted there was present something more than mere duplication.

3. The Examiner erred in failing to exclude Commission's exhibit 742 when the stipulation appearing at pages

529-530 of the record was entered into. When the Amended Complaint was issued it was agreed that the testimony of Hugh E. White and evidence introduced into the record through said White would not be considered as a part of the record under such Amended Complaint. (Tr. 529). This exhibit was prepared by White and introduced into the record through him and was relied upon by the Trial Examiner in his report upon the facts (Ex. Rec. Dec., p. 49, 52), but should not have been.

4. The Examiner erred in receiving in evidence Commission's Exhibit 793. (Tr. 869). This exhibit is a map of the United States which sets out the boundaries of the ten district offices of Sherwin. (Tr. 866-867). Counsel for the Commission conceded "there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments" (Tr. 868) but contended "We propose to connect that up with the method of the Sherwin-Williams Company of receiving orders and of shipping orders to customers, which we will show, 1098 the areas from which they ship and from which they receive orders, and it is relevant and material as showing the method of doing business of the Sherwin-Williams Company in connection with the sale of lead pigments." (Tr. 868-869). Thereafter, the said map was never referred to in the record and no testimony or other evidence was ever produced along the lines indicated by Counsel when the exhibit was offered and received in evidence. There is no testimony as to what part, if any, these ten district offices play in either the receipt of orders for lead pigments from, or shipments of such products into, the areas surrounding the respective offices. Sherwin maintains warehouses in about fifty-three cities from which less than car load and less than truck load shipments are made. (R. X. 198-A-H; C. X. 662-Z-21; Tr. 3756). Carload or truck load shipments are made from the plant in Chicago, Illinois. (Tr. 3746). So far as the record discloses this map illustrates merely the location, for general administrative purposes, of Sherwin's district offices. It must be remembered that Sherwin is one of the largest, if not the largest, paint manufacturers in the country and sells paint in several hundred of its own retail paint stores as well as through thousands of independent paint retailers. Consequently, it is perfectly normal and proper for it to maintain these district offices to perform certain func-

tions relative to the distribution of its principal sales item, paint, which is not involved in this proceeding. In
1099 view of the lack of connection, which Counsel for the Commission promised when the exhibit was received, we submit that the exhibit should now be excluded as not being relevant, competent or material to any issues in the case.

5. The Examiner erred in permitting a statement made by counsel for Sherwin to appear in the record, at pages 869 and 870, in the face of objection thereto. The statement referred to reads

> "Counsel for Sherwin-Williams agrees that it effects sales of white lead at retail to its customers through and at the location of its retail stores as they are listed on Commission's Exhibit 652-A to L, inclusive.
>
> "And further states that it is and has been the regular practice of Sherwin-Williams Company in making sales of white lead through and at the location of its above-referred-to retail stores to quote and charge its published delivered prices as are shown to have been applicable at each such destination. The practice thus followed has been and is in accordance with the policy of Sherwin-Williams Company pursuant to the instructions of its manufacturing officials."

It is contended that while the foregoing statement is a correct one, the facts there stated are not material to any lawful issue herein. We contend that "sales made by Sherwin at and through its several hundred retail stores located throughout the United States are intrastate transactions and are not subject to the provisions of the Federal Trade Commissions Act, as amended, or the Clayton Act, as amended." (Sherwin's Requested Conclusion of Law 1.) This contention is predicated upon the holding of the Supreme Court in the case of *Federal Trade Com-*
1100 *mission* v. *Bunte Bros.*, 312 U. S. 349. In the present case there is even more reason to hold that the transactions are intrastate and beyond the jurisdiction of the Commission because they involve sales in regularly operated retail stores, whereas the shipments in the Bunte case were made from the manufacturing plant. The principle announced in the case of *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2nd) 716, is not applicable because in that case the sales were F. O. B. mill or dock

ut of state, whereas purely local retail sales
ere. The Examiner recognized the correct-
above-quoted contention. (See Examiner's
rwin's Proposals as to Conclusion of Law
be no question but that such transactions
mmerce" within the meaning of the Federal
ssion Act. In so far as the Clayton Act is
re was no showing whatever that any sales
vin in any of its retail stores were discrimi-
ny other sales made by Sherwin or by any
ent which were interstate in character. In
h failure of proof there is no basis for con-
uch transactions are within the scope of the
Also, see paragraph 3 of Section IV of
f herein.

miner erred in receiving in evidence Com-
ibits 652 A-L (Tr. 827) and Commission's
A-N (Tr. 838). These two series of exhibits
lentify the location and supervisory person-
erwin's retail paint stores and are not mate-
y lawful issue herein. The basis for urging
nateriality is the same as that set forth in
error number 6 hereof.

miner erred in receiving in evidence Com-
bits 490, 491 and 492 (Tr. 2045) over timely
2044-2045). Item 8 of subparagraph A of
ven of the Amended Complaint raises an
e relationship between National Lead Com-
erican Smelting and Refining Company but
e Amended Complaint is there any charge
y relationship between Sherwin and Ameri-
nd Refining Company. These three exhibits
es of two purchase contracts by Sherwin for
at a set price, of certain quantities of cor-
rom American Smelting and Refining Com-
py of one letter from Sherwin to American
Refining Company inquiring as to whether
an supply any part of Sherwin's require-
following month. None of these documents
r material upon any lawful issue herein so
n is concerned.

Wherefore, Sherwin requests that the Commission, upon consideration of this appeal, reverse the rulings of the Trial Examiner as set out in the foregoing assignments of error.

Respectfully submitted,
Raymond N. Beebe,
T. J. McDowell,
James T. Welch.

Of Counsel
Davies, Richberg, Beebe, Busick
& Richardson

November 16, 1948.

* * * * *

1155 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman.
Lowell B. Mason.
John Carson.
Stephen J. Spingarn.
Albert A. Carretta.

ORDER DISPOSING OF RESPONDENTS' EXCEPTIONS TO RECOMMENDED DECISION.

This matter is before the Commission for its consideration of the respondents' exceptions to the hearing examiner's recommended decision herein.

I. Exceptions of Respondent National Lead Company.

Because of the respondent's failure in some instances to specify the portions of the record or the authorities relied on, as required by Rule XXIII of the Commission's Rules of Practice, and its failure in other instances to state the grounds or bases for its contentions with sufficient definiteness and precision to enable the Commission to readily observe the alleged errors of the hearing examiner upon examination of the record citations given, the follow-
1156 ing exceptions are denied: 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22, 38, 39, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 63, 64,

65, 66, 68, 76, 80, 81, 82, 85, 92, 93, 94, 95, 96, 98, 100, 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 124, 126, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 142, 143, 144, 145, 146, 147, 149, 150, 152, 153, 155, 156, 157, 158, 161, 162, 165, 166, 168, 172, 173, 174 (part), 175, 176, 177, 178, 179, 180 (part), 181, 182, 183, 184, 189, 190, 195, 196, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225 (part), 226, 227, 228, 230, 231, 232.

The other exceptions are disposed of as hereinafter indicated (page references are to the recommended decision).

Exception No. 1. The respondent excepts to the statement (page 2) that "Proposals (for findings and conclusions) were thereupon duly filed by all parties, * * *," on the ground that the proposals submitted by counsel in support of the amended complaint were not filed within the time fixed by the Commission.

The record shows that the proposed findings and conclusions of counsel in support of the complaint were filed on December 31, 1947. The Commission, by its order issued November 26, 1947, had provided that "Counsel may file proposed findings and conclusions, together with their reasons therefor, with the Trial Examiner on or before December 29, 1947, pursuant to Rule XXI of the Rules of Practice." It appears, however, that this order was entered upon an appeal filed by the respondents from a ruling of the examiner fixing December 1, 1947, as the date for filing proposed findings and conclusions, and thus, the sole purpose and effect of the order was to extend from December 1 until December 29, 1947, the time within which the proposed findings and conclusions might be filed. The 1157 order did not otherwise interfere with the authority of the hearing examiner, expressed in Rule XXI, to fix the time for the filing of such proposals, and while the record does not show the entry of an order by the examiner further extending the time within which counsel in support of the complaint might file his proposals, the mere fact that they were thereafter received and considered raises a presumption that such time was extended, and the examiner's recitation that the documents were "duly filed by all parties" renders the presumption conclusive. This exception is denied.

Exceptions Nos. 2, 3 and 4. The respondent excepts to the statements (pages 3 and 4) that the complaint alleged

in substance, among other things, (1) that respondent National exerted a monopolistic influence on the pricing of pig lead through its relations with American Smelting and Refining Company; (2) that the respondents, through conspiracy, quoted uniform differentials as between standard containers of seventy-five, fifty, twenty-five, and twelve and one-half pounds; and (3) that the respondents, by conspiracy, made quarterly contracts for the sale of lead pigments at a fixed differential over American Smelting and Refining Company's New York price for common pig lead. The amended complaint, in Paragraphs Seven A (8) and Nine B and C of Count 1, does in very specific language contain the allegations stated by the examiner. These exceptions are denied.

Exception No. 13. The respondent excepts to the statement appearing on page 6 that the answers to the questions in the case as outlined by the hearing examiner are largely matters of "inference", the respondent contending that where there is reliable, probative, and substantial evidence there is no room for the employment of "inference". It is noted, however, that the complete statement of the hearing examiner is that the answers "are largely matters of inference from the circumstances and manner of employment by respondents of the various particular methods admitted and shown," thus indicating that the examiner's find-
1158 ings were not based on mere inferences unsupported by the evidence, but rather upon all of the evidence, including that showing the conditions existing in the industry and the actual practices in which the respondents engaged. In this view of the examiner's statement, the observation was not incorrect, and the respondent's objection thereto is without foundation. The exception is denied.

Exceptions Nos. 17 and 163. The respondent excepts to the hearing examiner's statements (pages 7 and 62) that corroding pig lead differs from common pig lead in that it is desilverized. In this statement the hearing examiner was in error, and the exceptions are well taken. The record shows that corroding pig lead is simply a purer form of lead than common pig lead, and that either corroding pig lead or common pig lead may be desilverized. These exceptions are granted.

Exceptions Nos. 21 and 167. The respondent excepts to the statements (pages 8 and 63) that National Lead Company acquired the Evans Lead Company, of Charleston,

West Virginia, in "about 1944". The testimony of an official of respondent National was that Evans Lead Company was acquired sometime between 1931 and 1933, and nothing to the contrary appears. The date stated by the hearing examiner was an error, and the exceptions thereto are granted.

Exceptions Nos. 23 and 169 (part). The respondent excepts to the statements on pages 9 and 63 to the effect that its production of "dry white lead" from 1936 to 1941 was estimated as from 30% to 35% of the entire industry. As the respondent contends, this reference should have been limited to "dry white lead, basic carbonate", and inasmuch as the term "dry white lead" would include basic sulphate as well as basic carbonate, the statements as made were inaccurate. The exceptions are granted.

Exceptions Nos. 24 and 169 (part). The respondent excepts to the statements (pages 9 and 63) that the per-
1159 centage of white lead-in-oil produced by this respondent in 1932 "may have gone as high as 70%" of all of the white lead-in-oil produced in the country. The evidence on this point is that in 1943 the respondent's share of the white lead-in-oil business was approximately 60%. The record further shows that in 1932 and thereabout National's percentage was slightly higher, and that in years after that its percentage varied with a downward trend. There is nothing specific, however, to show that in 1932, National's percentage of the business was as high as 70%, or that it approximated that percentage, and the hearing examiner's statements were mere speculation. These exceptions are granted.

Exceptions Nos. 25, 27 and 169 (part). The respondent excepts to the charts appearing on pages 9 and 64, purporting to show the comparative percentages of production of white lead, dry and in oil, of the respondents and others, for the years 1938 through 1941, as being inaccurate. In these charts, the hearing examiner showed, among other things, that respondent National's percentage of the white lead business for the years stated was 55.475%. This figure should have been 55.575% and to this extent the charts are inaccurate. The hearing examiner also stated that the combined production of respondents National and Eagle-Picher for the same years was 68.825%. Due to the above inaccuracy in computing National's percentage, this figure was also inaccurate to the extent that it should have been

68.925%. To the extent indicated, these exceptions are granted; otherwise they are denied.

Exceptions Nos. 26 and 169 (part). The respondent excepts to the hearing examiner's statements (pages 9 and 64) to the effect that respondents Eagle-Picher and National were "potential" competitors. Insofar as these statements convey the impression that there was no real active price competition between these two respondents in the sale of their products, the statements are justified. To the extent that they connote a total absence of competitive effort as between the respondents in the development 1160 of the quality of their products and in the field of technical services offered customers, the statements are too broad. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 28 and 169 (part). The respondent excepts to the statements (pages 9 and 64) to the effect that the percentage of lead pigments production of respondent Eagle-Picher was "increased" by the acquisition by Eagle-Picher of the lead pigment plant and business of respondent International Smelting and Refining Company. On this point the record does show that on October 1, 1946, respondent Eagle-Picher acquired the lead pigment plant of respondent International. It does not show, however, that the lead pigment "business" of respondent International was acquired, and there is no evidence of any kind tending to show what effect, if any, Eagle-Picher's acquisition of this plant had on its relative position in the industry. These exceptions are granted.

Exceptions Nos. 29, 30, 31, 32 and 169 (part). The respondent excepts to the hearing examiner's statements (pages 9 and 64) that National's prices, terms and conditions of sale were followed generally by "all" of its domestic competitors; that it became a "predominant" factor in the industry; that its facilities for production were adequate to satisfy the entire market; and that its competitors "felt compelled" to follow its prices, all as being unsupported by the evidence. While the record is clear that all of the respondents in this proceeding followed generally the prices, terms and conditions of sale set by respondent National, it does not affirmatively show that those few lead pigments manufacturers who are not respondents did likewise. To the extent that the hearing examiner implied to the contrary, he was in error. The record further

shows, however, that respondent National did become a predominant factor in the industry in the sense that by 1935 it had become by far the largest and most powerful manufacturer of lead pigments and as such the undisputed market leader; and it also shows that National's fa-
1161 cilities were adequate to supply the entire market and that its competitors who are the respondents in this proceeding did feel that they could not avoid following its prices. On these points the examiner's statements are correct. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 33, 34 and 170 (part). The respondent excepts to the hearing examiner's summary of the facts concerning respondent National's ownership of approximately 50,000 shares of the capital stock of respondent Eagle-Picher, as set forth on pages 10 and 64, for the reason that said summary fails to include certain statements appearing in paragraph 16 of the respondent's proposed findings. There is no contention on the part of respondent National, and there could be none, that the hearing examiner's summary is in any respect inaccurate. Moreover, it appears that the additional statements proposed by the respondent, while also true, would contribute nothing to the significance of the facts stated by the hearing examiner. Such additional statements, if made, would have been only a recitation of the details of the circumstances of National's acquisition of its holdings of Eagle-Picher's stock, and the omission of these details, which, however, have been considered by the Commission, was not erroneous.

The respondent excepts also to the hearing examiner's reference to the witness, Charles Simon, as "secretary" of respondent National, and to his statement that this witness testified that "he did not know that National ever exercised any control over respondent Eagle-Picher." The record in this proceeding shows that the witness, Charles Simon, was treasurer of respondent National, and not that he was secretary. The transcript of this witness' testimony fairly considered also indicates that the witness intended to testify as a fact that while respondent National voted its stock in Eagle-Picher, it did not control Eagle-Picher's business affairs, and to the extent, if any, that the hearing examiner's statement imputes to this testimony any different meaning, the statement is erroneous. These

exceptions are granted in part and denied in part as indicated.

1162 Exceptions Nos. 35 and 170 (part). The respondent excepts to the statements (pages 10 and 64) that there is some direct evidence of close relations between respondents National and Eagle-Picher. There is no merit to these exceptions. The record shows, among other things, discussions between officials of the two companies concerning price changes, changes in certain Federal specifications, and various industry problems. A substantial portion of the evidence in this entire proceeding has to do with the cooperation of these two and other respondents in an effort to overhaul the pricing practices of the lead pigments producers. These exceptions are denied.

Exceptions Nos. 36, 37 and 171. The respondent excepts to the hearing examiner's statements (pages 11 and 65) that American Smelting and Refining Company, on its organization in 1899, acquired sixteen lead and copper smelters and eight refineries, and thereafter, in 1901, took over three smelters, one refinery and other related properties from M. Guggenheim's Sons. Exception is also taken to the statement that American Smelting and Refining Company produced between 30% and 40% of the world's supply of refined lead. Both of these statements are fully supported by the record. Commission's Exhibit 22 shows in detail the properties acquired by American Smelting and Refining Company at the time of its organization, and thereafter, in conformity with the hearing examiner's recital; and the testimony appearing at page 4093 of the transcript covers the percentage of refined lead produced by American Smelting and Refining Company. These exceptions are denied.

Exceptions Nos. 41 and 174 (part). The respondent excepts to the hearing examiner's statements (pages 12 and 66) to the effect that Hoyt Metal Company was acquired by National as a property of United Lead Company. These exceptions are well taken. The record shows that Hoyt Metal Company was a constituent company of respondent National Lead Company, but it does not show that it was acquired as a property of United Lead Company. These exceptions are granted.

1163 Exception No. 46. The respondent excepts to the hearing examiner's statement on page 13 to the effect that the chart there quoted represents National's purchases

for the years shown of "common and refined lead". This statement is inaccurate only in that it should have referred to "common and corroding pig lead" instead of to "common and refined lead". To this extent the exception is granted; otherwise it is denied.

Exceptions Nos. 54 and 180 (part). The respondent excepts to the hearing examiner's basic description of the uniform zone pricing system, set forth on pages 14 and 67, citing in support of these exceptions paragraphs 50 to 66 of the respondent's proposed findings and the authorities there cited. These exceptions are without foundation. The purpose of the statement objected to was to describe generally the uniform zone pricing system as used by the respondents after 1934 in order that the material following might be readily understood. Apparently, the respondent's objection is that the hearing examiner did not at this point in his report adopt the respondent's theory of the evolution of the system from the delivery and equalization point system employed in the industry prior to 1934, but even if that theory of the zone system's development had been adopted, its statement at this point in the report would not have been necessary. The hearing examiner's statement as made appears to be factually correct, and the respondent has not indicated otherwise. The exceptions are denied.

Exception No. 56. The respondent excepts to the use by the hearing examiner of the word "plan", on page 15, in describing the operation of the respondent's zone pricing system. The basis of the objection is not stated in the exception. It appears that the effective employment of the zone delivered pricing system as developed by the respondents did necessarily involve a "plan", and the hearing examiner's use of this designation cannot be said to have been improper. The exception is denied.

1164 Exception No. 67. The respondent excepts to the hearing examiner's statements on page 20 to the effect that the participation of certain named individuals and other representatives of the respondents in various meetings of the committees of the Lead Industries Association during N. R. A. days is shown by the minutes of these meetings. The objection is on the ground that there is nothing in the record to show that "all respondents" were represented on the committees or that they all participated in the various meetings. The hearing examiner did not so

state. He did state, and correctly, that all of the respondents belonged to the association; and the minutes of the various committee meetings do show, as the hearing examiner found, that F. M. Carter and Harold Rowe, of National, Messrs. Bendelari, Roosevelt and Maston, of Eagle-Picher, Paul E. Sprague, of Glidden, S. B. Coolidge, Jr., of Sherwin-Williams, F. W. Case, of International, and other representatives of the respondents participated in the various meetings. This exception is denied.

Exceptions Nos. 69 and 185. The respondent excepts to the statements (pages 20 and 70) to the effect that an exemption from the terms of Section 2 of Article VII of the Code for the Lead Industry, and from Schedule A attached to the code, was granted the respondents by the N.R.A. Administrator and thereafter extended so that these portions of the code were never effective. The objection is that the statement is "incomplete". Presumably, this is because the hearing examiner did not also say that the exemption order applied to other manufacturers of lead pigments as well as to the respondents. Insofar as the statement implies that the order applied only to the respondents it is inaccurate and to this extent the exceptions are granted. In all other respects the statement is correct, and except as indicated the exceptions are denied.

Exception No. 70. The respondent excepts to the following statement on page 21 insofar as it may be interpreted as representing the conclusion of the hearing examiner:

"Consequently, these Schedule A provisions are re-
1165 lied on as some of the evidence showing agreements as to practices which were unlawfully employed, and as showing use of the association machinery therefor."

When read in its context, this statement is subject to but one interpretation, namely, that counsel in support of the complaint relies on the provisions of Schedule A as some of the evidence showing unlawful agreements among the respondents. The hearing examiner was not in this paragraph of his report stating any conclusions whatever. This exception is denied.

Exception No. 71. The respondent excepts to the statement (page 21) that "Evidence to this effect (that agreements reached in the association committee meetings were solely with respect to recommendations of provisions to be included in the code) was received from Mr. Wormser and others", insofar as said statement implies that evidence to the effect stated was found only in the parol testi-

mony of Wormser and others. To the Commission the statement quoted does not imply that the only evidence bearing on the proposition was the parol testimony referred to. The affirmative recognition that certain evidence tended to support the respondent's contention does not necessarily mean that there was no other evidence to the same effect. At the same time, it is to be noted that the minutes of the various committee meetings and other documents cited by the respondent constitute evidence of agreements covering subjects other than those relating to provisions to be recommended for inclusion in the code as well as evidence of the formulation of such recommendations. This exception is denied.

Exceptions Nos. 72, 73, 74 and 186. The respondent excepts to the hearing examiner's references (pages 21 and 70) to "agreements on matters not included in recommendations for the Code, such as zone pricing and consignment contracts", on the ground that there is no proof of such "agreements". The respondent's position on these matters is untenable. Both the testimony and 1166 the documents in the record clearly show that in many of the committee meetings and elsewhere the subjects of zone pricing and consignment agreements were freely discussed, and the circumstances under which both of these practices were adopted and thereafter used is convincing evidence of the fact that the respondents did reach definite and certain agreements and understandings concerning them. These exceptions are denied.

Exception No. 75. The respondent excepts to the statement (page 22) that the witness, Wormser, "stated further that the Association has not, except during the period covered by the Code, permitted in the industry any agreements to fix prices and terms, restrain trade, monopolize or curtail production". The objection is that this statement is an inaccurate summary of Mr. Wormser's testimony. The inaccuracy, if any, in the statement occurs in the possible implication that Wormser admitted that during the code period there were among members of the industry agreements to fix prices and restrain trade. As the respondent contends, this witness did not admit this to have been true, and to the extent that the hearing examiner's statement may be subject to the interpretation that he did, said statement is inaccurate and to this extent the exception is granted. In all other respects the exception is denied.

Exceptions Nos. 77 and 187. The respondent excepts to the statements (pages 22 and 70) that "The consignment plan of selling white lead-in-oil and other keg products was inaugurated by National's Atlantic branch early in 1933 and was thereafter extended to its eastern territories. Eagle-Picher also started the plan about this time." These statements are in error in three respects: (1) The agency or consignment plan of selling applied only to white lead-in-oil transactions and was never used in connection with "other keg products"; (2) The plan was inaugurated by National's Atlantic branch early in 1932, not in 1933; and (3) Eagle-Picher began using the plan at about 1167 the time National extended it to its other branches, in 1933. To the extent indicated these exceptions are granted; otherwise they are denied.

Exceptions Nos. 78, 79 and 188. The respondent excepts to the statements (pages 22, 23 and 71) (1) that the agency or consignment method of selling was put before all respondents in a meeting of the White Lead-in-Oil Committee on August 9, 1933, and (2) that agreements to employ a uniform consignment plan were never authorized by the N.R.A. code. The first of these statements is inaccurate in that The Glidden Company, one of the respondents herein, was not represented at the meeting of August 9, 1933, at which the agency or consignment method was discussed. The second statement is correct in all respects. In the Commission's view of the evidence, there were agreements between respondents National and Eagle-Picher, participated in by respondent Anaconda (International), to sell white lead-in-oil in accordance with the agency or consignment plan, and such agreements were never authorized by any provision of the code. To the extent indicated the exceptions are granted; otherwise they are denied.

Exceptions Nos. 83, 84 and 191 (part). The respondent excepts to the statements (pages 24 and 72) to the effect (1) that Eagle-Picher began the use of consignment contracts when National did and conformed to National's methods in every essential particular until about March 9, 1942, and (2) that after 1942 Eagle-Picher required consignees to pay at the end of the month for all stocks held by them, but it indicated that the old contracts would be kept in force. Except in one particular, these statements appear to be correct. The one exception is that National began using agency or consignment contracts in its Atlantic branch early in 1932. Eagle-Picher did not begin using

such contracts until National extended the plan to its other branches in 1933. To the extent of correcting this inaccuracy the exceptions are granted; otherwise they are denied.

1168 Exceptions Nos. 86 and 191 (part). The respondent excepts to the hearing examiner's reference to National's and Eagle-Picher's "consignees" and "dealers" under their agency or consignment contracts, appearing on page 25. The references appear in the hearing examiner's description of Glidden's consignment contracts, and the terms as used have no particular significance. Technically, the consignees of National's white lead-in-oil were designated "agents" in the contracts, and Eagle-Picher's consignees were designated "distributors". They were nevertheless "consignees", and the hearing examiner's reference to them in that manner cannot possibly be prejudicial. These exceptions are denied.

Exceptions Nos. 87 and 192. The respondent excepts to the hearing examiner's statements (pages 25 and 73) to the effect that the respondents' suggested resale prices for white lead-in-oil and other keg products, with certain exceptions, were identical, and to the table included in the report to illustrate this fact. The various price cards in the record, as well as the testimony of many witnesses, clearly show that the prices at which the respondents suggested to dealers that they resell white lead-in-oil and other keg products were substantially the same at all comparable times. It does appear, however, that the table included in the report to illustrate this fact is erroneous in at least one respect, namely, it compares the suggested resale prices shown on the price card of respondent Glidden dated October 20, 1937, with the suggested prices of the other respondents dated September 13, 14 or 15, 1937, with the result that it indicates a difference in resale prices as between this respondent and the others which did not actually exist. Respondent Glidden's price card for September 13, 14 or 15, 1937, was not furnished, but a comparison of its cards for other periods with the cards of the other respondents for the same periods shows that at all comparable times the suggested resale prices of all were the same. The only respect in which this respondent's prices differed from the prices of the other respondents was in the price to dealers to compensate the dealers for handling Glidden's less popular products. To the extent indicated these exceptions are granted; otherwise they are denied.

1169 Exceptions Nos. 88 and 193. The respondent excepts to the hearing examiner's summary (pages 26-7 and 74) of the agreements with respect to provisions to be recommended for the code, which were entered into by the respondents as a result of the association meetings, regarding the collective fixing, quoting and employing uniform prices, terms and conditions of sale of lead pigments. The fact that the practices and methods referred to by the hearing examiner were freely discussed in the various committee meetings and recommended for inclusion in the supplemental code for the lead pigments industry is clear from the minutes of the various meetings and from the testimony of the witnesses who participated therein. Thus, the inference that the respondents did agree on the collective use of such practices and methods which were thereafter uniformly employed by all of them in the sale of their products is inescapable. These exceptions are denied.

Exceptions Nos. 89, 90, 91 and 194. The respondent excepts to the hearing examiner's statements (pages 27 and 74) (1) that references to particular prices as distinguished from price differentials were purposely omitted from the code provisions; (2) that respondent National put Article II of the supplemental code into effect some months prior to its formal adoption; and (3) the general nature of the code provisions concerning the differentials over American Smelting and Refining Company's prices for pig lead to be allowed in the sale of lead oxides. The fact that references to particular prices were purposely omitted from the code is clearly established, the evidence being that this was done in an attempt to avoid a direct violation of the antitrust laws. In stating that a part of the supplemental code was put into effect by National prior to its formal adoption, the hearing examiner was correct, but in this connection, he should have referred to Article III of Schedule A attached to the code and not to Article II of the supplemental code. His statement of the code provisions respecting the differentials to be charged over American Smelting and Refining Company's price on pig lead for lead oxides was inaccurate only in that it failed to specifically show that the stated differentials applied only to sales in carload quantities. In all other respects, the statements objected to appear to be accurate. To the extent indicated these exceptions are granted, otherwise they are denied.

1170 Exceptions Nos. 97 and 197. The respondent excepts to the table of "parallel" quotations on white lead-in-oil "and other keg products," set forth on pages 29 and 76. While the respondent did not particularize the errors claimed to exist in this tabulation, it does appear that the table is inaccurate. In preparing the table the hearing examiner apparently has included quotations of respondent National to "dealers" as that term is used by National, rather than "distributors"; has included quotations applicable to zones other than the par zone; and has used at least one price card (that of respondent Glidden) bearing a date different from the dates on the other cards used. In addition, the hearing examiner erroneously stated that the quotations given applied to "other keg products" and to containers larger than one hundred pounds. To the extent indicated these exceptions are granted.

Exception No. 99. The respondent excepts to the statement (page 30) to the effect that its "quotations" and those of respondent Eagle-Picher were "identical" in the periods there referred to, except for the quantity requirement of Eagle-Picher in 1939 and 1941. It is apparent that the hearing examiner in this statement was referring to "quotations" to dealers and others occupying similar positions. The "quotations" referred to by the respondent, on the other hand, in support of its exception were to government agencies, differences in which did exist, as the hearing examiner found. This exception is denied.

Exception No. 107. The respondent excepts to the hearing examiner's statement (page 35) to the effect that the respondents were shown to have quoted and allowed a uniform differential of twenty-five cents as between the various container sizes used to contain one hundred pounds of lead pigments, and to his statement that the use of this practice was admitted by all respondents. The fact that all of the respondents charged the differential referred to was established by the evidence, and it does not appear that this was seriously contested. In fact, evidence was introduced by both National and Sherwin-Williams to show that this differential was less than the costs involved as between single containers requiring only one process
1171 of sealing, packing, labeling and handling, and the costs of additional containers, each of which required the same processing. It may not be a precise statement to say, as the hearing examiner said, that all respondents ad-

mitted the practice, but the fact that it was used is clear. Except insofar as the exception relates to the statement that the respondents "admit" the use of the practice in question, the exception is denied. To the extent that it challenges the use of the word "admit" the exception is granted.

Exception No. 108. The respondent excepts to the statement (page 35) that "National continued to make quarterly contracts for car lots of lead oxides until 1942, and these followed generally the code provisions of subsections (b) and (c), Article III of Schedule A". The fact that quarterly contracts for the sale of dry white lead were made until 1942 was established by the testimony of the witness, McCarthy, and appears on pages 1658 and 1659 of the transcript. It does not affirmatively appear, however, that quarterly contracts for the sale of lead oxides were made by National during the period specified, and this exception is accordingly granted.

Exception No. 115. The respondent excepts to the hearing examiner's use of the word "system" in describing the territorial or zone pricing practices shown to have been engaged in. There is no merit in this exception. Obviously, the practice, as employed by the respondents, involving as it did, the sale of lead pigments on a zone delivered price basis, with a flat par price for all deliveries in a par zone, and increased uniform differentials over the par price for various zones other than the par zone, was a pricing "system" within the ordinary and commonly accepted meaning of the word. This exception is denied.

Exception No. 123. The respondent excepts to the hearing examiner's conclusion (page 43) to the effect that the zoning system used by the respondents operated to prevent near-mill customers from having any special advantage over their competitors located at a distance. The hearing examiner further found, however, that the respondents' failure to extend this advantage to near-mill customers had no adverse competitive effects within any one zone. The respondent's objection is to the implication that f.o.b. pricing would ever afford near-mill customers special benefits. The evidence is that such pricing would provide the customers nearer the mill with an exclusive competitive advantage which would extend in diminishing degree all the way to the location of the distant purchaser who would pay the mill net price plus freight. Thus, the near-mill customer would be on an

ting with the distant purchaser at the lat-
and at all points beyond. Under the re-
tem of selling to all customers in a zone at
ered price, this advantage to the near-mill
noved. The exception is denied.

Nos. 125, 126, 127, 128, 160, 214 and 233. The
epts to the hearing examiner's conclusions
44, 45, 46, 57, 58, 85, 86, 87 and 95) that the
ve violated the Federal Trade Commission
ayton Act, as amended, in the manner and to
e stated. For the reasons set forth in its
he facts in this proceeding, the Commission
greement with these conclusions of the hear-
and is of the opinion that the respondent's
hese conclusions are without merit. They
denied.

Nos. 140 and 141. The respondent excepts
nts (page 53) that a tabulated study intro-
spondents to show the differences in average
ht costs between car and less-than-car ship-
hite lead (Resps.' Exs. 215 and 216) "was
from National's Atlantic Branch" and that
ows an average cost excess of about one-
er pound on less-than-car shipments. The
ontention is that these statements are con-
idence and inaccurate. In connection with
the evidence is that the freight figures on
cover shipments of white lead from all of
nches, but that the invoices used in the
assumed to be typical of all shipments were
he Atlantic branch only. The hearing ex-
statement that the difference in average
freight costs as shown by the tabulation was
pound" did not purport to state the differ-
sion, and it appears that the approximation
lose to the differences actually shown. To
ated the exceptions are granted; otherwise
l.

Nos. 148 and 225 (part). The respondent
hearing examiner's statements (pages 55
On dry white lead it is not clear that there
l unjustified quantity differential between
urchasers", the respondent contending that
ted evidence establishes that the differen-
arload and less-than-carload shipments of

dry white lead was less than the difference in the respective costs of sale and delivery of the two quantities. On this point, the record does show that the differences in freight rates as between carload and less-than-carload shipments of white lead were sufficient to justify this price difference of one-quarter cent in transactions in which rail freight was a factor. It further appears, however, that white lead is sold in large quantities in and around the paint manufacturing centers of St. Louis, Chicago, Philadelphia and New York, and that in such sales deliveries are made from the respondents' lead producing plants in these localities by local cartage, with the result that in such transactions rail freight is not a factor in computing delivery costs. The record contains no evidence of any kind to show that in these instances the one-quarter cent differential can be justified, and respondent National apparently recognized that no such justification was possible since the cost data submitted by it included no transactions other than those in which rail freight was involved. These exceptions are denied.

Exception No. 151. The respondent excepts to the statements appearing on page 55 to the effect that differences in the respondents' mill nets resulting from shipments from par points to par destinations and from par points to premium zone destinations where the added increment was no more than the additional freight were not shown to have involved cost disadvantages as between dealers and processors purchasing the respondents' products, for the reason that the statement should have been that there were no discriminations in prices at all within the meaning of Section 2(a) of the Clayton Act, as amended, arising out of the use of the territorial method of selling as employed by the respondents. The Commission does not agree with the respondent in this respect. For the reasons set forth in its findings as to the facts herein, the Commission is of the opinion that the record does show that there were involved in the respondents' zone pricing system unlawful discriminations as between purchasers of the respondents' products located in different zones. This exception is denied.

1174

Exceptions Nos. 154 and 229. The respondent excepts to the hearing examiner's statements (pages 56 and 94) that the respondents' inter-zone prices "are justified only where the additional freight equals or exceeds the zone

premium". In view of the fact that the respondents' efforts to justify their zone differentials were based on the theory that such differentials did not exceed differences in the average freight charges applicable to the several zones, the hearing examiner's statements are sound. The exceptions are denied.

Exception No. 159. The respondent excepts to the hearing examiner's reference on page 57 to effects arising from the respondents "cooperatively" or "collusively" employing the same discriminations, on the ground that the record does not show that any discriminations or other practices were "cooperatively" or "collusively" employed. For the reasons stated in its findings as to the facts, however, the Commission is of the opinion that the respondents did act "cooperatively" and "collusively" in the matter of fixing and maintaining prices, terms and conditions for the sale of their lead pigments, and it follows that the hearing examiner's use of these terms was not erroneous. This exception is denied.

1175 Exception No. 164. The respondent excepts to the statement (page 62) that "The respondents produce practically all but a small quantity of the lead pigments produced in the United States * * *", on the ground that the statement finds no support in the evidence. The Commission is of the opinion that the record does amply support the statement. There are in the country a few relatively small independent producers of lead pigments other than the respondents, and some of the manufacturers of mixed paints were shown to have produced some of their own requirements of white lead-in-oil, but it is to the respondents that purchasers and consumers must look generally for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available for shipment in commerce. Illustrative of this situation is the showing made that in 1943 respondent National alone produced 60% of the white lead-in-oil sold in the United States, and the further showing that in the years 1938 through 1941 the respondents combined accounted for approximately 95% of all shipments of white lead, both dry and in oil. The hearing examiner's statement is unassailable and the exception thereto is denied.

Exception No. 200. The respondent excepts to the statement (page 79) to the effect that it was not shown that

a uniform contract for the sale of lead pigments was agreed on, for the reason that the statement is incomplete in that it fails to show that a uniform contract was not used. It is true, as the respondent contends, that the record does not show that a uniform contract was used generally in the sale of lead pigments. To the extent that the hearing examiner's statement may be said to imply otherwise this exception is granted. In all other respects it is denied.

Exceptions Nos. 234, 235, 236 and 237. The respondent excepts generally to the recommended order to cease and desist included in the recommended decision and specifically to each of the paragraphs and subparagraphs thereof, on the ground that said order and each of its
1176 parts is unwarranted by the record or by the Federal Trade Commission Act or the Clayton Act, as amended. For the reasons set forth in its findings as to the facts and its conclusion in this proceeding, the Commission is of the opinion that the respondents have violated the Federal Trade Commission Act and Section 2(a) of the Clayton Act, as amended, and further that the issuance of an appropriate order to cease and desist is necessary and in the public interest. Insofar as the Commission's order is in substance the same as that recommended by the hearing examiner, the recommended order has been adopted. Insofar as the two are not the same, said recommended order has not been adopted, not for any of the reasons assigned by the respondent but solely because the Commission is of the opinion that provisions other and different from those recommended will more adequately correct the evils found to exist. These exceptions are denied.

Exceptions Nos. 238, 239 and 240. The respondent excepts to the hearing examiner's failure to find in haec verba as requested in a number of specified paragraphs of its proposed findings, and excepts to the denial of a number of other proposed findings and conclusions, and in addition adopts as its own and incorporates in its exceptions by reference all of the exceptions taken by each of the other respondents herein, except those that may be inconsistent with the exceptions of this respondent. To the extent, if any, that the Commission's findings as to the facts and conclusions incorporate any of the respondent's proposals and conclusions which were not adopted or which were rejected by the hearing examiner, the rulings of the hearing examiner on the same are disapproved and the

respondent's exceptions are granted. In all other respects and in all other instances the rulings of the examiner on the proposals are approved and the respondent's exceptions are denied.

1177 II. Exceptions of Respondent the Sherwin-Williams Company.

The exceptions of this respondent noted in the left-hand column below are in substance or effect the same as the exceptions of respondent National Lead Company noted in the right-hand column of the tabulation, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same:

Exceptions of The Sherwin-Williams Company	Exceptions of National Lead Company
1	3
2	4
3	6
7	14
12 (part)	23
13	25
15	29
16	38
19	61
20	62
21	63
23	65 to 76, inclusive
25	87
26	88
27	89
28	91
29	92
30	95
31	97
32	97
36	100
40	102
41	103
45	105
46	106 and 107
48	109
52	114

Exceptions of the Sherwin-Williams Company	Exceptions of National Lead Company
54 to 58, inclusive	116
63	120
64	122
1178 65	124
66	125, 126 and 128
67	129
71	134
76	142
77	143
80	146
81	147
84	153
86	155
87	156
89	159
91	160
92	162
93	240
95 (part)	234
97	234 and 236
98 to 108, inclusive	239 and 240

In the exceptions numbered 5, 33, 34, 39, 51, 60 and 62 the respondent has failed in some instances to specify the portions of the record or the authorities relied on, as required by Rule XXIII of the Commission's Rules of Practice, and has failed in other instances to state the grounds or bases for its contentions with sufficient definiteness and precision to enable the Commission to readily observe the alleged errors of the hearing examiner upon examination of the record citations. These exceptions are accordingly denied.

The other exceptions are disposed of as hereinafter indicated.

Exception No. 6. The respondent excepts to the hearing examiner's failure to include in his outline of the principal issues in this proceeding (page 6) a statement of the issues raised by Sherwin-Williams in the special defenses set up in its answer to the amended complaint.

1179 The special defenses so raised by Sherwin-Williams are (1) that its pricing activities have been pursued

in good faith to enable it to compete in the sale of lead pigments with other sellers, and that such activities have not constituted unfair methods of competition or unfair acts or practices within the meaning of the Federal Trade Commission Act or unlawful price discriminations under subsection (a) of Section 2 of the Clayton Act, as amended; (2) that any pricing system for the lead pigments industry which would result in a uniform net return on all sales, or any other system substantially different from that used by the respondent, would have the tendency and capacity to create territorial spheres of monopoly for some sellers, with the effect of excluding others having a freight disadvantage from the market; and (3) that where its net return from sales of identical quantities to identical classes of purchasers in different competitive areas varies, such variance does not constitute an unlawful price discrimination within the purview of Section 2(a) of the amended Clayton Act. It was not necessary for the hearing examiner to include specifically any of the issues raised by these defenses. As the hearing examiner stated, the principal and ultimate issues for decision in this case, among others, are whether the respondents agreed to maintain fixed and identical prices on lead pigments through the cooperative employment of the zone pricing system and other practices alleged; whether the use of the respondents' zone pricing system involved unjustified price differences between customers located in a single zone and between customers located in different zones; and whether the price differences, if they existed, had the tendency and effect of lessening competition. The answer to the question whether or not the respondents have violated the Federal Trade Commission Act or Section 2(a) of the Clayton Act, as amended, or both, depends altogether on the final disposition of these issues, and the matters raised in this respondent's special defenses, while proper subjects for consideration in connection with the main issues, are only subsidiary to such issues. This exception is denied.

1180 Exceptions Nos. 8 and 9. The respondent excepts to the hearing examiner's failure to state on pages 7 and 62 that Sherwin-Williams does not manufacture or sell basic lead sulphate or any other lead pigments except red lead, litharge and basic lead carbonate, and that for over twenty years Sherwin-Williams has not sold red lead or litharge to the battery manufacturing industry. As the

respondent contends, the record does disclose that Sherwin-Williams does not manufacture or sell basic lead sulphate or any other lead pigment except red lead, dry and in oil, litharge, white lead, basic carbonate, and white lead-in-oil (which, however, are the principal lead pigments with which this proceeding is concerned, the other lead pigments being blue lead, orange mineral and grinders lead paste), and that it does not sell oxide to battery manufacturers. It was not necessary, however, for these facts to be stated at the points referred to in the recommended decision, especially since they were recognized by the hearing examiner at other places in the report. On the other hand, the Commission has no desire to minimize them, and to the extent that the recommended decision as a whole fails to clearly portray the facts stated it is deficient. Insofar as these exceptions complain of the failure of the hearing examiner to include these facts on pages 7 and 62 of the recommended decision, they are denied. To the extent, if any, that the recommended decision as a whole fails to clearly show the facts, the exceptions are granted.

Exception No. 10. The respondent excepts to the statements (pages 7 and 62) that "Respondents Glidden and Sherwin also manufactured and sold mixed paints made from lead pigments produced by them or purchased from others", on the ground that the record does not establish the fact that Sherwin-Williams purchases lead pigments from others for the purpose stated. To the extent that the above statement implies that Sherwin-Williams purchases lead pigments from others for use in the manufacture of mixed paints it is unsupported, and to this extent this exception is granted.

1181 Exception No. 11. The respondent excepts to the hearing examiner's failure to include on pages 7 and 62 a detailed statement of Sherwin-Williams' competitive position in 1943 in the sale of white lead-in-oil and its relative position in the sale of other lead pigments. The part of the recommended decision in which the respondent desired this information consists of a general statement of the business in which the respondents in the proceeding are engaged and general information concerning the products with which the proceeding is concerned. It would not have been consonant with the method of presentation followed by the hearing examiner for the detailed facts respecting the competitive position of Sherwin-Williams to

have been included at this point in the report, and the fact that it was not so included was not erroneous, especially since all of the pertinent facts were stated elsewhere. This exception is denied.

Exceptions Nos. 12 (part) and 14. The respondent excepts to the hearing examiner's failure to state, on pages 9 and 64, (1) that basic lead sulphate is used to a substantial extent by Eagle-Picher, and to some extent by National, as an alternative product to basic carbonate in sales to paint manufacturers, and (2) insofar as the record discloses, the extent of the production and sale of basic sulphate by Eagle-Picher and National. The hearing examiner, on pages 9 and 64, was discussing the acquisitions of respondent National Lead Company, and as an incident thereto included a tabulation showing the percentages of white lead-in-oil for the entire industry sold by National and by the other respondents, respectively, during the years 1938 through 1941. The importance of white lead-in-oil in the paint manufacturing industry having been clearly established in the record, the competitive positions of National and the other respondents in the sale of this product obviously is a matter of primary importance in the proceeding, and the fact that lead sulphate may be used also by paint manufacturers is more or less immaterial. Even if it be conceded that National and Eagle-Picher did sell quantities of it to paint manufacturers, that part would not detract from the significance of the percentages 1182 of white lead-in-oil sold by the respondents, and the examiner's failure to state that basic lead sulphate was also sold by National and Eagle-Picher could not prejudice this respondent in any way. These exceptions are denied.

Exceptions Nos. 17, 68, 69, 70, 74, 82 (part), 83 and 85. In these exceptions the respondent objects to various statements made by the hearing examiner in which he either said or implied that respondent Sherwin-Williams, along with the other respondents in this proceeding, employed the zone delivered pricing system in selling lead pigments. Throughout the proceeding it has been the contention of Sherwin-Williams that it does not now, and that it never has, employed the zone pricing system, but has sold its lead pigments on a basis of free delivery and equalization points similar to the method used by all the members of industry prior to 1933, and that all of the statements indicating

that it uses a zone system are erroneous. For the reasons set forth in its findings as to the facts being issued in this proceeding, the Commission is of the opinion that Sherwin-Williams' position in this respect cannot be supported. It was shown, among other things, that notwithstanding the company's professed policy of requiring purchasers to pay freight charges in sales to locations other than certain shipping points, Sherwin-Williams in a majority of the transactions concerning which evidence was introduced absorbed the transportation costs, with the result that the prices paid and received in the transactions were exactly the same as though such prices had been computed in accordance with the zone system employed by the other respondents. The Commission is of the opinion, therefore, that for all practical purposes the company used the system and that the statements of the hearing examiner to that effect were fully justified. The exceptions to such statements are denied.

Exception No. 18. The respondent excepts to the hearing examiner's listing of the cities (pages 16 and 68) from which shipments of certain lead pigments were made and sold in accordance with the zone pricing system and 1183 priced through the use of certain differentials over American Smelting and Refining Company's price for pig lead, without at the same time stating which of the respondents have plants located at the various cities named. The hearing examiner at this point in his report was describing generally the zone pricing system under which he found that the respondents, acting cooperatively, priced their products. For the purpose of this description it was not necessary for him to there show which of the respondents had plants located at the various cities from which the shipments were made. The critical question in connection with the phase of the case to which the examiner was then addressing himself was whether or not the respondents had entered into an unlawful combination to use the zone system of pricing, and the answer to this question did not depend upon an answer to the further question which of the respondents had plants in which cities. This exception is denied.

Exception No. 22. The respondent excepts to the statement on page 19 as follows: "Since the particular practices as individually employed are not controverted in essential respects, the substance of the issue is agreement

and cooperation." The respondent's objection is that "the record establishes substantial variance between the practices employed by it (Sherwin-Williams) individually as compared to practices employed by the other respondents herein." The hearing examiner elsewhere in his report clearly pointed out the differences between the practices of this respondent and the practices of the others. Moreover, he did not at this point in the report say that the practices of all of the respondents were the same, but only that the particular practices as individually employed were not controverted in essential respects. The exception is denied.

Exceptions Nos. 24, 49, 59, 61, 72, 73, 75, 82 (part), 90 and 95 (part). In these exceptions the respondent objects to various statements and conclusions, and to one of the provisions of the recommended order based thereon, 1184 in which the hearing examiner either said or necessarily implied that respondent Sherwin-Williams was a party to an understanding or agreement among the respondents to fix and maintain prices, terms and conditions of sale of lead pigments and that the use of the zone pricing system and the other practices described in the recommended decision were employed by said respondents, including Sherwin-Williams, pursuant to said understanding or agreement. The respondent's contention is that it was not a party to any such understanding or agreement and that none of its pricing practices have been the result of any cooperation with any other respondent. For the reasons set forth in its findings as to the facts in this proceeding, the Commission has reached the conclusion that the respondents, including Sherwin-Williams, availed themselves of the opportunity afforded by the National Industrial Recovery Act to cooperatively revise the pricing practices of the lead pigments industry, and that they entered into and thereafter carried out certain definite understandings and agreements for the purpose of accomplishing that result. The Commission is of the opinion, therefore, that the hearing examiner's statements and inferences to which the respondent objects were fully justified, and these exceptions are accordingly denied.

Exception No. 35. The respondent excepts to the hearing examiner's failure to state on page 76 that the freight costs from Sherwin-Williams' shipping points to purchasers' destinations would have to be ascertained and

added to the quotations appearing in the table set out in full on page 29 and incorporated on page 76 by reference (showing certain price quotations on white lead-in-oil in 100-pound containers), in order to make accurate comparison as to the purchasers' relative costs in buying from the various respondents. In view of the fact that in the transactions shown Sherwin-Williams quoted f.o.b. certain shipping points, it would not be possible, of course, to determine the final cost to a customer of this seller without adding to its quotations the transportation charges from its shipping point to the customer's location; 1185 and in view of the further fact that the quotations of National and Eagle-Picher included costs of delivery, a comparison of a purchaser's relative costs in buying from the respective respondents would necessitate the addition to Sherwin-Williams' quotations of the cost of delivery from its shipping point. The exception to the hearing examiner's failure to state this fact on page 76 is granted.

Exceptions Nos. 37 and 38. The respondent excepts to the statements (pages 33 and 77) to the effect that the record of 1230 sales of white lead-in-oil tabulated on pages 31 and 32 shows (1) that the prices of Anaconda (International), Glidden and Sherwin-Williams were substantially uniform, and (2) that Sherwin-Williams made a certain number of sales under National's lowest price. For the reasons assigned in support of the ruling granting exception No. XIII to the recommended decision filed by counsel in support of the complaint the tabulation of sales set out on pages 31 and 32 of the recommended decision is inaccurate in a number of respects. Hence, any conclusions to be derived from the tabulation are also inaccurate, and the respondent's exceptions thereto are accordingly granted.

Exceptions Nos. 42, 43 and 44. The respondent excepts to the statements (pages 34 and 77) to the effect that instructions were given on Sherwin-Williams' trade bulletins for large dealers' prices to be followed on government, state and municipal bids, insofar as said statements say or imply that Sherwin-Williams' managers and salesmen were instructed to follow its large competitors' prices on government, state and municipal bids. If in the statements referred to the hearing examiner intended to convey the impression that Sherwin-Williams instructed its managers

and salesmen to follow its large competitors' prices when submitting bids to the government, states or municipalities, the statements are erroneous. There is no testimony or other evidence to support that interpretation of the
1186 instructions, and the instructions themselves apparently meant only that quotations to the government, states and municipalities should be on the same basis as quotations to Sherwin-Williams' large dealers.

The respondent also objects to the above statements for the reason that they imply that the instructions referred to are now in effect. There is no indication that this is the case. To the extent that the hearing examiner's statements are subject to the interpretations indicated, these exceptions are granted.

Exception No. 47. The respondent excepts to the statement (page 35) to the effect that Sherwin-Williams continues to make quarterly contracts for oxides, and the price is based on the New York market for pig lead. The statement is erroneous. The record citations given by the hearing examiner reveal that up to the time of the hearings in this case Sherwin-Williams did enter into contracts for the sale of white lead covering the quarterly requirements of purchasers, but that it did not enter into such contracts for the sale of oxides. This exception is granted.

Exception No. 50. The respondent excepts to the statements (pages 36 and 79) to the effect that National's acquisitions and its close cooperation with Eagle-Picher gave the two respondents more than 68% of the white lead, dry and in oil, business in the United States. This statement is inaccurate to the extent that it includes basic sulphate of lead business as well as basic carbonate of lead business. The record discloses that for the years 1938 through 1941 National's percentage of the entire white lead, dry and in oil, business in the United States (not including white lead, basic sulphate, business) was 55.575% and that Eagle-Picher's share of the same business was 13.35%. Thus, the combined production of these two of white lead, dry and in oil (excluding white lead, basic sulphate) for the years
1187 stated was 68.925%. To the extent, if any, that this percentage figure would be either raised or lowered by taking into consideration the white lead, basic sulphate, business, the amount of which is not disclosed in the record, this exception is granted.

Exception No. 53. The respondent excepts to the hear-

ing examiner's failure to state on page 80, in connection with his statement that the respondents' zone pricing system had the effect of facilitating price matching and producing price uniformity, that it was not shown that a substantial surrender of territorial advantages by any respondent was involved. The inclusion of this statement was not necessary at this point. The hearing examiner was there considering the general effects of the respondents' zone pricing system under Count I of the amended complaint, and in that connection the question whether or not the respondents had surrendered any territorial advantages is immaterial. This exception is denied.

Exceptions Nos. 78 and 79. The respondent excepts to the hearing examiner's failure to state on pages 54 and 92, in connection with his statements of the effects on battery manufacturers and paint manufacturers of the price differences resulting from the discriminations practiced by the respondents in the sale of oxides and white and red lead, (1) that Sherwin-Williams does not sell oxides to battery manufacturers, and (2) that the record does not disclose sales by this respondent of dry white lead or dry red lead to paint manufacturers. The record does disclose that Sherwin-Williams for a number of years had not sold oxides to battery manufacturers, and to the extent that the hearing examiner's failure to mention this fact on pages 54 and 92 conveys the impression that Sherwin-Williams sold oxides to battery manufacturers, the recommended decision is erroneous. (The record further discloses that Sherwin-Williams did sell lead pigments to paint manufacturers.) The hearing examiner was of the opinion, however, and the Commission agrees, that the evidence in this proceeding definitely connects Sherwin-Williams up with the overall conspiracy, found to have existed among the 1188 respondents, to fix and maintain prices, terms and conditions of sale of lead pigments. The fact that one co-conspirator does not participate in each and every one of the acts or practices involved in a conspiracy is not determinative of the extent to which such co-conspirator should be held, and consequently, the fact that Sherwin-Williams did not sell oxides to battery manufacturers is not as important an element in this case as Sherwin-Williams contends. Thus, the Commission holds only that Sherwin-Williams was entitled to have stated in the recommended decision the fact that it does not sell oxides to battery

manufacturers, and does not hold that this fact is of any particular significance in determining whether or not this respondent is answerable for the over-all conspiracy. To the extent indicated Exception No. 78 is granted. Exception No. 79 is denied.

Exception No. 88. The respondent excepts to the sentence (page 57) "The differential of ¼¢ per lb. between 500-lb. and smaller lots of white lead-in-oil and other keg products was not shown to be justified by differences in costs of any kind" for the stated reason that it is not supported by the record insofar as Sherwin-Williams' sales to dealers purchasing for resale are concerned. The reasoning set forth in the ruling on Exceptions Nos. 78 and 79 is equally applicable here. The record shows that one of the practices involved in the proceeding was that of charging a differential of one-quarter cent per pound as between 500-pound lots and quantities less than five hundred pounds of white lead-in-oil, and the hearing examiner on page 57 was discussing this practice generally and the competitive effects thereof. The correctness of the statements made is not questioned by Sherwin-Williams, and it was not necessary in the statement of this phase of the case to refer to the particular practices of the individual respondents. This exception is denied.

Exception No. 94. The respondent excepts to the hearing examiner's failure to include in his recommended 1189 decision, substantially in haec verba, certain of Sherwin-Williams' proposed findings having to do with the fact that the respondents were not shown to have surrendered any inherent territorial advantages in the use of the zone system, and specifying the cities in which the lead pigment plants of the various respondents are located and the competitive positions of the respondents in the industry. The pertinent facts with respect to all of these matters were sufficiently set out in the recommended decision, and all of such facts were considered. It was not necessary for the precise form requested by Sherwin-Williams to be followed. This exception is denied.

Exception No. 96. The respondent excepts to paragraph 4 of the recommended order to cease and desist, on the ground that the record fails to disclose that Sherwin-Williams has sold lead pigments at different zone delivered prices to competing customers located in different zones; or that it has sold oxides at different quantity differentials

between carload and 5-ton and smaller quantities. For the reasons set out in its findings as to the facts in this proceeding, the Commission is of the opinion that Sherwin-Williams has, with certain exceptions, employed the zone delivered pricing system in substantially the same manner as have the other respondents. The record also shows, and Sherwin-Williams does not deny, that it, along with the other respondents, has quoted and charged different prices as between carloads and smaller quantities of oxides. The competitive effects of both of these practices having been established and found, an effective prohibition against the continuation of such practices is appropriate. The fact, if it be a fact, that the evidence in the record does not include actual instances in which Sherwin-Williams sold to competing customers in different zones in accordance with the zone pricing system or in which it sold oxides to competing purchasers in carload lots at one price and in quantities less than carloads at another price is immaterial. The recommended order was properly directed against Sherwin-Williams as well as the other respondents, and this exception is accordingly denied.

1190 III. Exceptions of Respondent The Glidden Company.

The exceptions of respondent Glidden enumerated in the left-hand column below are in substance or effect the same as the exceptions of respondents National Lead Company or The Sherwin-Williams Company, or both, shown in the middle and right-hand columns of the tabulation, respectively, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same.

Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
1	3	1
2	4	2
3	6	3
4 and 6		6
5		5
7	14	7
8	15	

of en	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
	16	
		10
		11
	23 (part)	12 (part)
	25	13
	25 and 27	11
	27	
	30	
	38	16
		17
	54	
	56	
	57	
	58	
	59	
	60	
	61	19
	62	20
	63	21
	63	21
		22
	65 to 76, inc.	23
		24
	87	25
	88	26
	89	27
	91	28
	92	29
	95	30
	97	31
	97	32
		33
		34
		35
	100	36
		37 and 38
		37
		38
		39
	102	40

Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
50	103	41
51	104	
52		44
53	105	45
54	105	
55	106 and 107	46
56	109	48
57		49
58		50
59		51
60	114	52
61		53
62	116	54
63	116	55
64	116	56
65	116	57
66	116	58
67		59
68		60
69		61
1492		
70	119	62
71	120	63
72	121	
73	122	64
74	124	65
75	125, 126 and 128	66
76	129	67
77		68
78		69
79		70
80	134	71
81	135	
82		73
83		74
84	142	76
85	143	77
86	144 and 145	
87		79
88	146	80
89	147	81

Exceptions of The Glidden Company	Exceptions of National Lead Company	Exceptions of The Sherwin-Williams Company
90	149, 150 and 151	
91		82
92		83
93	153	84
94		85
95	155	86
96	156	87
97	157	
98	159	89
99		90
100	160	91
101	162	92
102		95
103	236	97
104	237	
105 to 108, inc.	238 to 240, inc.	98 to 108, inc.

In its exception No. 32, respondent Glidden excepts to the following sentences appearing on pages 25 and 73 of the recommended decision: "Glidden's price under this plan (the consignment plan of selling white lead-in-oil) 1193 was 'the same as that of other corroders' ", for the stated reason "that it is not evidence of agreement or conspiracy but merely evidence that Glidden is a price follower". There is no indication whatever that the hearing examiner considered the identity of Glidden's prices under its consignment plan of selling with the prices of the other corroders as evidence of agreement or conspiracy. On the contrary, he expressly stated in his report that Glidden was opposed to the plan; that it did not consign stocks until six years after the plan was inaugurated; and that when it did do so its plan differed from that of the other respondents in a number of respects. It does not follow, however, because of these facts that Glidden may escape the result of the Commission's corrective action against this practice, for, as the hearing examiner found, the use of the consignment plan of selling was only one of the many practices covered by the general price-fixing conspiracy entered into and carried out by the respondents, including respondent Glidden, the use of each of which practices contributed to and made more effective the over-all conspiracy, and it is

necessary in such circumstances for the Commission to restrain each of the respondents not only in respect of the particular practices engaged in by it but in respect of all of the practices covered by the conspiracy. Glidden's exception No. 32 is denied.

IV. Exceptions of Respondents Anaconda Copper Mining Company and International Smelting and Refining Company.

Respondent Anaconda Copper Mining Company in its exceptions numbered 1, 6 and 8, and respondent International Smelting and Refining Company in its exceptions numbered 1 and 29 each excepts to the action of the hearing examiner throughout the recommended decision in treating Anaconda and International as one. The arguments are that these two respondents are separate corporations; that Anaconda is not even engaged in the lead pigments business; and that there is no record basis for the view that Anaconda is responsible for the acts or practices of International. It appears from the record, however, that
1194 for sixteen years prior to 1936 white lead and white lead-in-oil were produced by Anaconda Lead Products Company, a subsidiary of respondent Anaconda Copper Mining Company, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, another subsidiary of Anaconda Copper Mining Company. In 1936 the assets and properties of Anaconda Lead Products Company were acquired by respondent International, also a subsidiary of Anaconda Copper Mining Company, and Anaconda Lead Products Company was thereupon dissolved. From 1936 until the fall of 1946 International continued the production of white lead and white lead-in-oil, and these products were sold and distributed by both International and Anaconda Sales Company, the division of business between the two depending upon the states in which business was done.

The principal officers of International and Anaconda Copper Mining Company are the same, and it is clear that respondent International and the former Anaconda Lead Products Company were in fact operating divisions of respondent Anaconda Copper Mining Company, with no substantial separate identities of their own.

In view of these facts, the hearing examiner was fully

justified in disregarding the separate corporate entities of these two respondents and treating them as one, and the exceptions to this action are accordingly denied.

The exceptions of these respondents enumerated under their respective names in the columns below are in substance or effect the same as the exceptions of respondents National Lead Company, The Sherwin-Williams Company or The Glidden Company, shown in the columns under their respective names, each of which has been disposed of hereinabove, and the ruling on each of these corresponding exceptions is the same.

1195

Exceptions of Anaconda	Exceptions of International	Exceptions of National	Exceptions of Sherwin-Williams	Exceptions of Glidden
2	2	6	3	3
	3	10		
3	7	14	7	7
	4	11		
5, 10	20, 41	240	93	108
	5	12		
	6, 10	13		
7	22	130		
	8	52		
	9	61, 62	19, 20	25, 26
	12	107	46	55
	13	114	52	60
	15	116	54 to 58, inc.	62 to 66, inc.
	16	117, 118		
	17	121, 122, 124	64, 65	72, 73, 74
	18	125, 126, 128	66	75
	19	126, 128	66	75
	21	129	67	76
	23	132		
	24	134	71	80
	25		85	94
	26	157		97
	27	158, 159	89	98
	28	160	91	100
	33	208		
	34	212		

Exceptions of Anaconda	Exceptions of International	Exceptions of National	Exceptions of Sherwin-Williams	Exceptions of Glidden
	35	213, 214		
	36	214		
	37	215		
	38	216		
	40	233		
12, 13	43,44	238 to 240, inc.	98 to 108, inc.	105 to 108, inc.

1196 The other exceptions of these respondents are disposed of as follows:

Separate Exceptions of Respondent Anaconda.

In its exceptions 4 and 9, Anaconda excepts to a number of paragraphs in the recommended decision in which it is referred to as "Anaconda" or by such collectives as "respondents", "all respondents", "as between respondents", "each respondent", "other respondents", "competitors" or "smaller competitors", for the reason that each and all of such findings are unsupported by the record as to this respondent. The grounds relied upon in support of these exceptions are not specified. It is assumed, however, that the objection is founded upon the proposition that Anaconda is not engaged in the lead pigments business and that the evidence in support of the hearing examiner's findings as applied to Anaconda related primarily to the acts and practices of respondent International Smelting and Refining Company, another corporation. This respondent's exception No. 11, objecting to its inclusion in the recommended order is based upon the same argument. For the reasons given in its ruling on Anaconda's exceptions numbered 1, 6 and 8 and International's exceptions 1 and 29, the Commission is of the opinion that the hearing examiner's treatment of these respondents as one was fully justified. It follows that the above-mentioned exceptions must be, and they are, denied.

Separate Exceptions of Respondent International.

In its exceptions 11, 30, 32, 39 and 42, respondent International excepts to a number of paragraphs in the recommended decision, including the fact that it was named in the recommended order, on the stated grounds that all of the

findings specified are unsupported by the evidence and that the record does not show that International was a party to, or engaged in, any of the acts complained of in the amended complaint. These exceptions are so general in their scope and so indefinite in their nature as to make it impossible for the Commission to determine with any degree of certainty just what the respondent's position is with respect to them. The exceptions are therefore
1197 denied, for the reason that they do not comply with the requirements of Rule XXIII of the Commission's Rules of Practice in that they do not specify the portions of the record or the authorities relied upon to sustain each point, and for the further reason that the Commission, after considering the record, is of the opinion that this respondent was a party to, and did participate in, the acts and practices attacked in the amended complaint.

In its exception No. 14, International objects to the hearing examiner's statement (page 38) that Anaconda had a plant in Chicago. The record shows that the plant to which the hearing examiner referred was located in East Chicago, Indiana, and to the extent of correcting the statement to specify this location, this exception is granted.

In its exception No. 31, this respondent excepts to the statement (page 73) to the effect that it sold dry white lead on a consignment basis in the State of Wisconsin. This exception is granted. The evidence is that International did sell white lead-in-oil on the basis of a consignment contract in the State of Wisconsin, but there is no indication that dry white lead was ever sold by it on a consignment basis.

V. Exceptions of Respondents The Eagle-Picher Company and the Eagle-Picher Sales Company.

After stating that the recommended decision of the hearing examiner treats the practices of Eagle-Picher as incidental or tributary to those of National, "thus dispersing direct and indirect reference to them throughout the Recommended Decision, and rendering it difficult to challenge each allusion to Eagle-Picher separately and individually", Eagle-Picher in its exceptions A-1 and A-2 asserted two general exceptions, to-wit, (1) as to matters arising under Count I of the complaint, that the hearing examiner erred in holding that National acted illegally in attaining or attempting to attain a monopolistic position

of dominance in the lead pigments industry and that
1198 Eagle-Picher has contributed in any way to National's monopolistic delinquency, and (2) as to matters arising under Count II, that the examiner erred in that he concluded that Eagle-Picher was violating Section 2(a) of the Clayton Act, as amended, without making the appropriate and necessary findings of fact as to Eagle-Picher. In its exception B, the respondent excepts just as generally to the hearing examiner's refusal to grant certain of Eagle-Picher's proposed findings of fact.

This material, while entirely appropriate for inclusion in a brief on the merits of the case, is not in the form of exceptions to specified portions of the recommended decision and does not meet the requirements of Rule XXIII of the Commission's Rules of Practice governing exceptions to recommended decisions. In view of the Commission's inability to rule on the exceptions without in effect quoting in haec verba its findings as to the facts and conclusion in this proceeding, said exceptions are denied.

Eagle-Picher's exceptions C-1 to C-33, inclusive, are in substance or effect the same as certain of National's exceptions, each of which has been disposed of hereinabove, and the ruling on each of the exceptions of Eagle-Picher enumerated in the left-hand column below is the same as the ruling on the corresponding exception of National shown in the right-hand column of the tabulation.

Exceptions of Eagle-Picher	Exceptions of National
C-1	7, 8 and 9
2 and 25	23 and 28
3	33, 34 and 35
4	108 and 109
5	111
6	116
7	116
8	116
9	116
1199	
C-10	117
11	121
12	124
13	124
14	125
15	126

Exceptions of Eagle-Picher	Exceptions of National
16	127
17	128
18	128 and 129
19	133
20	154
21	155
22	160
23	160
24	167, 168, 170, 171, 172, 173, 174, 175, 176, 206, 211, 214, 218 and 225
26	170
27	202
28	206
29	207
30	229
31 and 32	233
33	234 to 237, inc.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

Issued: January 12, 1953.

1200 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson
Stephen J. Spingarn,
Albert A. Carretta.

ORDER GRANTING IN PART AND DENYING IN PART EXCEPTIONS OF COUNSEL IN SUPPORT OF THE COMPLAINT TO THE RECOMMENDED DECISION.

This matter is before the Commission for its consideration of a number of exceptions to the hearing examiner's recommended decision, filed by counsel in support of the complaint.

Exception No. I. This is an exception to the hearing examiner's failure to include in his statement of the issues in this proceeding (page 6 of the recommended decision) the question whether or not each of the respondents has used the various zone delivered price quotations and methods of quoting prices alleged in Paragraphs Eight, Nine and Ten of Count I of the amended complaint for the purpose and with the effect of eliminating price competition, it being the contention of counsel that the allegations of Paragraphs Eight to Ten attack the pricing prac-
1201 tices of each of the respondents individually aside from any element of conspiracy. The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone methods of selling therein described, and that each of the respondents employed certain terms and conditions in selling their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine "for the purpose and with the effect of enabling the

respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves", thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that "The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public", etc. If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms. The hearing examiner's statement of the issues was not erroneous in the respect mentioned, and this exception is denied.

Exception No. II. Counsel excepts to the hearing examiner's failure to include in his description of the products involved in the proceeding (page 7) the detailed definitions and descriptions contained in the proposed findings submitted by counsel in support of the complaint. It does appear to the Commission that certain of the issues in this proceeding cannot be thoroughly understood without more detailed information concerning the prod-
1202 ucts involved and the competitive position they occupied than that supplied by the hearing examiner. To the extent that such information was not supplied, this exception is granted.

Exception No. III. This is an exception to the hearing examiner's finding (page 7) that "Respondents Glidden and Sherwin also manufactured and sold mixed paints * * *", on the ground that each of the other respondents, except International, at one time or another also produced and sold mixed paints or the equivalent. If by the statement objected to the hearing examiner intended to imply that Glidden's and Sherwin-Williams' position was substantially different from that of the other respondents insofar as this case is concerned, the implication was unjustified. It does appear, however, that the percentage of business in mixed paints done by Glidden and Sherwin-Williams in relation to their lead pigments business probably was greater than the percentages of mixed paint busi-

ness done by the other respondents, and the statement of this fact, as such, was not erroneous. To the extent indicated, this exception is granted; otherwise it is denied.

Exception No. IV. This is an objection to the hearing examiner's statements on pages 9 and 63 listing together the branch offices and plants of respondent National Lead Company in such fashion as to indicate that pigment manufacting plants are operated by National in Omaha, Nebraska; Buffalo, New York; Boston, Massachusetts; New Orleans, Louisiana; Cincinnati, Ohio; and Pittsburgh, Pennsylvania. The exception is well taken. The cities designated are locations of branch offices of National Lead Company, but as far as the record shows no pigment manufacturing operations are conducted therein. This exception is granted.

Exception No. V. Exception is taken to the statements on pages 10 and 64 to the effect that by 1932 National Lead Company had accumulated 44,900 shares of the capital stock of respondent Eagle-Picher, for the reason that the statement does not show that the stock was acquired in the name of E. J. Cornish as an individual, who was at the time Chairman of the Board of Directors of National Lead Company, and does not show that other
1203 stocks held by National was held in the name of the corporation. Both of these facts are matters of importance in connection with the question whether respondent National actually sought to obtain control of respondant Eagle-Picher, nad they should have been specifically mentioned. The exception is granted.

Exception No. VI. This is an exception to the statements appearing at various places in the recommended decision to the effect that respondent Glidden "quoted" or "sold" "f. o. b. various shipping points in the par zone". To the extent that such statements imply that Glidden did not employ the zone method of pricing substantially as set forth in the amended complaint and in conformity with the practices of the other respondents, the statements are erroneous. Glidden admitted in its answer, and has not sought to deny, that it has employed this system of selling its lead pigments. On certain of its price cards, respondent Glidden did list a group of f. o. b. points, but the record shows that these were warehouse points rather than delivery points and that Glidden in fact did not add freight from these points to its zone de-

livered quotations. To the extent that the hearing examiner's statements imply otherwise, this exception is granted.

Exception No. VII. This exception has to do with a number of statements in the recommended decision to the effect that respondent Sherwin-Williams did not follow the zone system of pricing its products. As shown in the Commission's findings as to the facts being issued in this proceeding, Sherwin-Williams did contend that its policy was to sell its lead pigments in accordance with a free delivery point system, under which it charged to purchasers located away from a delivery point transportation charges from the delivery point to the purchaser's location. The facts developed in the hearings indicate, however, that in a majority of instances Sherwin-Williams' price quotations were actually zone delivered prices and that except in a small number of cases the company absorbed all transportation costs to purchasers' locations.

The Commission has accordingly concluded that 1204 Sherwin-Williams sold its lead pigments under the zone delivered price system in substantially the same manner as did the other respondents, and the statements of the hearing examiner implying the contrary are erroneous. This exception is granted.

Exception No. VIII. Objection is made to the statement (page 16) that "Dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more were sold at a differential of $2.50 per cwt. for red lead and $1.50 for litharge over Smelting's closing price", on the ground that only red lead and litharge were sold at such differentials. In including pigments other than red lead and litharge in this statement the hearing examiner was in error. Prices on lead pigments other than red lead and litharge in carload quantities were quoted on the respondents' regular price cards. This exception is granted.

Exception No. IX. Counsel excepts to the hearing examiner's statements (pages 20 and 70) to the effect (1) that the purpose of the 1933-1934 meeting held by the several committees of the Lead Industries Association was to recommend provisions for a supplemental code of fair competition "to regulate particular methods of packaging, selling and delivering lead pigments", and (2) that "Schedule A provides for basing carload prices for lead oxides on Smelting's New York price * * *". The rec-

ord shows that the various committee meetings at which the respondents were represented were held in 1933 and 1934 to discuss, adopt and formulate recommendations for provisions to be included in a supplemental N. R. A. Code for the lead pigments division of the lead industry. Just what these provisions might be and what form they might take were open questions, and as far as the record shows it might or might not have been the purpose of some or all of the participants to work on provisions for the regulation of methods of packaging, selling and delivering lead pigments. As it actually turned out, the discussions at the meetings and the agreements there made did cover a number of subjects which were not included in any recommendation for the code and which apparently were never intended to be covered in any code provision; 1205 and the record thus shows that the legitimate purposes of the meetings were to that extent transcended. If by the above statement the hearing examiner meant that the occasion for the meetings was lawful, there can be no objection to it. If he intended to imply that all of the objectives sought by the participants were legitimate, that implication is erroneous.

The Commission finds no fault with the second statement objected to, namely, that Schedule A attached to the code provided for basing carload prices for lead oxides on Smelting's New York prices. Article II of Schedule A did provide that in the sale of oxides in carload lots the price should be determined by adding a differential to the New York common pig lead price quotations of American Smelting and Refining Company (or, under certain conditions the quotations of the American Metal Market and the Engineering and Mining Journal) and that is the meaning the Commission finds in the hearing examiner's statement.

To the extent indicated, this exception is granted; otherwise, it is denied.

Exceptions Nos. X and XI. Counsel in support of the complaint excepts to the hearing examiner's tabulation of the par zone recommended resale prices of all of the respondents on one hundred pounds of white lead-in-oil, set forth on page 26. To the extent that the objection goes to the inclusion in the tabulation of respondent Glidden's price card dated October 20, 1937, thus comparing Glidden's price card of that date with the price cards of the

other respondents dated September 13, 14 and 15, 1937, the tabulation is erroneous. The tabulation is also misleading in that it conveys the impression that differences existed between certain of the resale prices suggested by Eagle-Picher and Anaconda, on the one hand, and those suggested by the other respondents, on the other, which and 11, 1937, quotations of Anaconda and Eagle-Picher, respectively, on 25 and 12½-pound packages of pigments were on a per unit basis, whereas the quotations of 1206 the other respondents for comparable dates were based on one hundred pounds. The tabulation also erroneously included a price quotation of Anaconda dated May 3, 1941, for the plus ½¢ zone, which was 12½¢ above the par zone quotation.

Counsel also excepts to the statement on page 73 that there were slight variations in quoted prices by Glidden and Anaconda, based upon the above tabulation.

Because of the errors in the tabulation above mentioned, these exceptions are both granted.

Exceptions Nos. XII, XIII and XIV. Exceptions are taken to (1) the so-called table of parallel quotations on white lead-in-oil shown on page 29; (2) the table entitled "Sales of White Lead-in-Oil—Par Zone—Price Per Cwt.—January Through March, 1941", shown on pages 31 and 32; and (3) the statements summarizing the Sales of White Lead-in-Oil, January through March, 1941, table, made on page 33. Both of the tables referred to are erroneous. In both of them the hearing examiner has included quotations of National to "dealers" as that term is used by National, rather than its quotations to "distributors", who were in fact the bulk of the dealers to whom National gave a lower price; and in the table of "parallel quotations" he has included quotations applicable to zones other than the par zone, and has used a price card by Glidden which was issued on a different date than the cards of the other respondents mentioned. The Sale of White Lead-in-Oil, January through March, 1941, table being erroneous, the summary of the table necessarily reflects the errors and is also erroneous. The exception to these tabulations and to the summary are granted.

Exception No. XV. This exception is to the hearing examiner's statement (pages 33-34 and 77) to the effect that sales of red lead and litharge, as evidenced by certain invoices of National, Eagle-Picher and Glidden followed

the regular formula "with occasional exceptions covered by contract sales and sales to battery manufacturers", on the ground that the word "some" should be inserted before the second word "sales" and the word
1207 "large" should be inserted before the word "battery" so that the finding will accurately reflect the record. The record does show that only on occasional instances involving large battery manufacturers who were in a position to produce their own oxides did the respondents make concessions from their regular prices. To the extent, if any, that the hearing examiner's statements imply otherwise, the statements are inexact and to that extent the exception is granted. In all other respects the statement is accurate and the exception is denied.

Exception No. XVI. Counsel in support of the complaint objects to so much of the reportand recommended findings on pages 36 to 38 and on pages 79 and 80 as indicate that the respondents' use of the zone pricing system was not shown to have deprived any group of customers of any rights inhering to them as a result of their proximity to the manufacturers' producing points and that the use of the system was not shown to have involved a substantial surrender of territorial advantages by any respondent. On the pages to which these exceptions refer the hearing examiner was discussing generally the evidence of the effects of the respondents' zone pricing on competition under Count I of the amended complaint. For the purposes of this count it was sufficient to find that the use of the system by conspiracy had the effect of hindering or restraining competition to a substantial degree between and among the respondents and of depriving customers, wherever located, of the benefits of that competition. The hearing examiner found as a fact that the respondents' acts and practices did have those effects, and the additional statements to the effect that customers were not shown to have been deprived of any rights they had by reason of their locations and that the respondents were not shown to have given up any substantial territorial advantages were mere gratuities and their consideration under Count I is unnecessary. For this reason, the exception to said statements is granted, it being understood, however, that this

sarily constitute an approval of the entire sel in support of the complaint concerning effects of the use of the zone pricing sys-

on No. XVII. This exception is to the hear-iner's statements (pages 41 and 72) that Anaconda was not shown by direct evidence to any pricing methods beyond the show-resentatives were present at the committee d the adoption of the Schedule A provi-hearing examiner subsequently found, Ana-iary, International Smelting and Refining adopt the zone system at about the same e other respondents, and it did thereafter in accordance with that system, publishing prices identical with the prices of the other except that on white lead in-oil its prices ve cents lower than those of National and o compensate the dealers for handling a ct less well known than National's "Dutch le-Picher's "Eagle" brands). The finding (International) participated in the con-ly justified by the record, and to the extent, statement objected to places this respondent bstantially different from that of the other e exception is granted.

os. XVIII and XIX. Each of these excep-the hearing examiner's statements (pages 6) that the zone system of pricing as em-espondents was not shown to have had the ffect of suppressing competition between he same zone. The statements are in the ategory as the statements covered by the tion No. XVI, and the rulings on the ex-o are the same as the ruling heretofore xception XVI.

. XX. Counsel in support of the complaint statements on pages 52, 55, 57, 91 and 94 effect that the one-quarter cent per pound il employed by the respondents as between nd smaller quantities of dry white lead was e justified on the basis of differing freight icable to the two quantities. This exception he record does show that the difference in

carload as against less-than-carload freight rates was sufficient to justify this price difference in most transactions in which rail freight was involved. The record further shows, however, that substantial quantities of dry white lead are sold in and around the cities in which the respondents' white lead producing plants are located and that in such transactions the mode of delivery is local cartage in which no rail freight is involved. The record contains no evidence of any kind tending to justify on a cost of delivery basis or otherwise the one-quarter cent differential as to customers in these transactions and under these circumstances, and the exception to the hearing examiner's unqualified statements is accordingly granted.

Exception No. XXI. Exception is taken to the failure of the hearing examiner to include on pages 53-54 and 92 a finding of all of the facts shown by the record concerning the effects of the respondents' discriminatory prices in the sale of oxides on battery manufacturers. Specifically, counsel in support of the complaint contends, and the Commission agrees, that the hearing examiner should have found that the storage battery manufacturing business was highly competitive on a price basis from 1935 to 1941; that large battery manufacturers located at a considerable distance from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis and other pigment producing centers, at prices below the cost of manufacture of comparable products to the smaller battery producers located in such centers; and that the cities of Chicago, Kansas City and St. Louis were among the cities where battery manufacturers were in competition with chain and mail order producers. The hearing examiner also erred in stating that the ten small battary manufacturers who testified that a saving in cost of materials of from five to ten cents per battery would be of competitive advantage were located outside of Chicago (five 1210 of the ten were from Chicago), but the Commission finds no fault with the statement of the effect of their testimony. Except insofar as this exception states that the hearing examiner should have found that "price differences of a very few cents on smaller batteries determined sales," the exception is granted.

Exception No. XXII. This exception relates to the hearing examiner's statements (pages 55 and 92) to the effect that there is no difference in zone differentials on carload

sales of red lead and litharge as between Dallas, Texas and St. Louis, Missouri. This is an obvious error. St. Louis was in the par zone for both carload and less-than-carload shipments of red lead and litharge, while Dallas was in the twenty-five cent premium zone for sales of these products in both quantities. This exception is granted.

Exceptions Nos. XXIII, XXIV and XXIX. In these exceptions counsel in support of the complaint excepts to the hearing examiner's failure to include in the recommended decision a finding to the effect that the use by each of the respondents of the zone system of pricing produces systematically varying mill net discriminations in violation of Section 2(a) of the Clayton Act, as amended, and to his failure to include in the recommended order an appropriate prohibition based on such a finding. It may be that in a case in which this question is properly raised a finding similar to the one requested and an order based thereon would be appropriate. The Commission is of the opinion, however, for the reason given in the "Conclusion" appended to its findings as to the facts being issued in this proceeding, that the allegations of the amended complaint in this case purporting to charge that each of the respondents, through the use of the zone method of pricing has discriminated in price as between customers in the same zone in violation of Section 2(a) of the amended Clayton Act does not state a cause of action. Hence, it will not consider any of the contentions of counsel in support of the complaint or of counsel for the respondents on this point. These exceptions are accordingly denied.

1211 Exception XXV. Exception is taken to the hearing examiner's failure to include respondents Anaconda and International in that part of the recommended order to cease and desist appearing on page 97. This exception is well taken. The record shows that Anaconda through its subsidiaries participated with the other respondents in the over-all conspiracy found to have existed and thus engaged in a course of conduct clearly unlawful under the Federal Trade Commission Act. The fact that certain members of a conspiracy may not have engaged in all of the overt acts or practices covered by the conspiracy, or may have engaged in some of them reluctantly, does not mean that it is not necessary for the Commission to restrain such members, along with the others, from conspiring to engage in such acts or practices in the future, and

does not operate to prevent the Commission from doing so when in its discretion such action is found to be necessary: This exception is granted.

Exceptions Nos. XXVI, XXVII and XXVIII. Counsel in support of the complaint excepts to the hearing examiner's failure to include in the recommended order provisions (1) prohibiting each of the respondents from quoting or selling lead pigments at prices determined pursuant to a zone or other pricing system producing uniform prices or reflecting a transportation factor greater or less than the actual cost of transportation when done for the purpose or effect of systematically matching delivered price quotations with other respondents; (2) prohibiting each of the respondents from discriminating in price between competing customers through the use of consignment arrangements; and (3) prohibiting each of the respondents from discriminating in price between competing customers through the use of differentials as between sales of carloads and smaller quantities of white lead in and around the producing points of this product. Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint 1212 charges, and the proof supports the charge, that each of the respondents individually has violated the Federal Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers. Accordingly, the Commission's order to cease and desist in this proceeding will include

such a prohibition. Based upon the record showing that it is fully justified, the order will also include a provision prohibiting each of the respondents from discriminating in price as between competing customers through the use of price differentials as between sales of lead pigments in carloads and in smaller quantities. To the extent that these provisions comply with the request of counsel in support of the complaint, his exceptions to the recommended order are granted. The order will not include a provision prohibiting discriminations as between competing dealers through the use of consignment arrangements for the reason that the record does not show that the dealers with whom the respondents entered into consignment arrangements were "purchasers" within the meaning of Section 2(a) of the Clayton Act, as amended, and the exception to the omission of this provision from the recommended order is denied.

Exception No. XXX. This is a general exception "to every portion of the Trial Examiner's Recommended Decision which is inconsistent with and contrary to the 1213 Proposed Findings, Conclusion and Order to Cease and Desist filed with the Trial Examiner by counsel supporting the complaint on December 29, 1947, and January 22, 1948". This exception does not comply with the requirements of Rule XXIII of the Commission's Rules of Practice, and is accordingly denied.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,

(Seal) *Secretary.*

Issued: January 12, 1953.

1214 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—(5253) * *

Commissioners:

James M. Mead, *Chairman*,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

ORDER DISPOSING OF RESPONDENTS' APPEALS FROM RULINGS OF HEARING EXAMINER.

This matter is before the Commission for its consideration of appeals filed by the respondents, National Lead Company, The Sherwin-Williams Company and The Glidden Company, from a number of rulings of the hearing examiner relating to the admission into the record and retention of certain parol and documentary evidence. Pursuant to the provisions of a stipulation entered into by and between counsel and thereafter approved by the Commission, said appeals and the briefs in support thereof were filed at the time of the filing of the respondents' briefs on the merits of the case.

1215 1. Appeal of Respondent National Lead Company.

The first twenty-nine exceptions noted in the appeal of respondent National Lead Company relate to the admission in evidence of a series of exhibits designated Commission's Exhibits 501-A to 524-E, inclusive, as well as the series of Commission's exhibits numbered 799 to 805-C, inclusive, and Commission's Exhibit 711. These documents, consisting of copies of minutes of a number of meetings of the various committees of the Lead Pigments Division of the Lead Industries Association held during the period 1933-1934, and related documents, were objected to upon the ground that they were N.R.A. documents and hence, inadmissible by reason of the provisions of Section 5 of the National Industrial Recovery Act. Respondent National also moves that a series of similar exhibits introduced by it in explanation of the Commission's exhibits above specified be stricken from the record in the event the

rulings of the hearing examiner receiving the Commission's exhibits are reversed.

There is no merit in the respondent's contentions. The exhibits objected to are not "N.R.A. exhibits", as they are characterized by the respondent, but are the minutes of the meetings of various divisions of a private organization and copies of correspondence between officials of the respondents and other private parties. Moreover, the discussions engaged in at the meetings concerning the establishment of the zone pricing system, consignment contracts and other matters had to do in part with subjects which apparently were never intended to be included in any N.R.A. code and in part with subjects which were subsequently covered by the provisions of a supplemental code, but which were never effective. Thus, Section 5 of the National Industrial Recovery Act, providing that actions complying with the provisions of any code, agreement or license approved, prescribed or issued and in effect under the Act should be exempt from the provisions of the antitrust laws for the period of time therein stated, has no application to
1216 the activities to which these exhibits relate and do not in any sense render them inadmissible in evidence. In view of the showing that the respondents, after invalidation of the N.R.A., continued without change the use of the zone pricing system and the various other trade practices discussed in the meetings of which these exhibits are the minutes, the exhibits were properly admitted to prove the nature and origin of the agreements found to have been unlawful.

In its exception No. 30 the respondent points out that Commission's Exhibit 624-C, being a memorandum signed by one Diemont, allegedly an agent of National Lead Company, was admitted on the condition that it be shown that Diemont was such an agent as to bind National Lead Company by his statements, and that no such showing was ever made. Counsel in support of the complaint concedes that this exhibit was not sufficiently connected up or identified to make it binding upon National Lead Company or any of the other respondents in this case, and it follows that the respondent's objection to the retention of this exhibit is well taken.

This respondent's exception No. 31 concerns the receipt by the hearing examiner of Commission's Exhibit 525, being a copy of a letter dated December 14, 1933, addressed to The Sherwin-Williams Company of Canada, Ltd., and

signed by Harold Rowe, then assistant to the president of respondent National, enclosing an announcement of price changes on dry white lead and basic sulphate in lots of less than twenty tons. Objection to the document having been made on the ground, among others, that there was no showing that The Sherwin-Williams Company of Canada, Ltd., was subject to the control of respondent Sherwin-Williams or otherwise affiliated with it, the exhibit was received by the hearing examiner "subject to connection". The record does not disclose that any effort was thereafter made to establish any connection between the addressee of this letter and any of the respondents in this case, including respondent Sherwin-Williams, and there is no showing
1217 of any relationship between such addressee and respondent National other than that of purchaser and seller. In the circumstances it cannot be said that the contents of this letter are relevant to any of the issues in this proceeding and the exhibit will not be considered.

Exceptions Nos. 32 and 33 relate to the reception in evidence of Commission's Exhibits 691, 692, 696 and 697, being copies of correspondence between certain officials of respondents Eagle-Picher and National and the Lead Industries Association. Objections to these documents were made upon the ground that they were irrelevant. It appears, however, that these exhibits were offered for the purpose of showing a disposition on the part of National Lead Company and The Eagle-Picher Company to work together in solving their common problems in the distribution of lead pigments and related products, and inasmuch as the correspondence has to do with meetings and discussions between these respondents on such matters, the exhibits are relevant and competent to show that there was no real price competition between National Lead Company and The Eagle-Picher Company.

The document concerned in exception No. 34 is a telegram dated March 12, 1941 from the Pacific Coast branch of National Lead Company to The Eagle-Picher Company at Cincinnati, Ohio, announcing a change in prices of white lead-in-oil and dry red lead applicable to Manila, The Philippine Islands. The exhibit was objected to upon the ground that it was "wholly irrelevant". It seems obvious to the Commission, however, that an exchange of price information between the two largest producers of white lead-in-oil and dry red lead has a direct bearing on the issues in this proceeding, one of which is promotion of a

price-fixing conspiracy by the exchange of such information.

Exception No. 35 has to do with the receipt in evidence of Commission's exhibits 708 and 710, being letters exchanged between officials of respondents National and Eagle-Picher in July 1940, concerning the prices at which Eagle-Picher would attempt to market a new white lead paint. The respondent's objection is based upon the fact that the letters referred to a ready-mixed paint and not lead pigments and that, therefore, the documents were irrelevant. There is no merit in this argument. The
1218 record clearly shows that there is a direct relationship between white lead-in-oil and mixed paints, white lead paint being basically white lead-in-oil to which mineral spirits and thinners have been added. In view of the over-all conspiracy with which this proceeding is concerned, evidence showing the exchange of price information on mixed paints is clearly relevant and admissible.

Exception No. 36 relates to the receipt of Commission's Exhibits 797-C to Z-6, inclusive, 533, 534, 535 and 577-A to C, inclusive. The objections were that these documents were irrelevant, incompetent and immaterial. Commission's Exhibit 797-C to Z-6, inclusive, consists of certain contracts between respondent National and E. I. duPont de Nemours Company, Inc., and certain cost data of duPont relating to the contracts, under which duPont was to supply the raw materials which National was to convert into white lead-in-oil and supply to duPont for sale and distribution. The other exhibits consist of correspondence relating to these contracts. The amended complaint, in Paragraph Seven B (7), specifically charges that one of the methods and practices used by respondent National in promoting the alleged conspiracy between it and the other respondents was to enter into contracts and understandings with duPont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of maintaining fixed prices on white lead. Exhibits other than those to which the respondent has objected show that in the meetings of the Lead Industries Association at which certain agreements relating to price fixing were discussed National was acting as agent of duPont and otherwise disclose the position of duPont in the lead pigments pricing picture. The exhibits showing the relations between National and duPont, whereby National undertook to manufacture white lead-in-oil for duPont, were properly received to complete this picture.

Exception No. 37 concerns the receipt of Commission's Exhibit 538, being a letter from Mr. Rowe of respondent National to Mr. Reque of National's Chicago office, dated April 8, 1941, in which Mr. Rowe stated that he had
1219 seen an article in the Oil, Paint and Drug Reporter wherein the duPont Company had announced a change in its policy on cash discounts, and in which Mr. Rowe expressed the hope that the industry generally would go along with this company's policy. Objection was on the ground that the document was irrelevant and immaterial. It appears that this exhibit, as well as Commission's Exhibit 808-A to N, inclusive, consisting of certain pages from the Oil, Paint and Drug Reporter for certain dates in May, June and August 1934, objection to which was also raised in the respondent's exception No. 38, were introduced for the sole purpose of establishing the approximate date on which the zone method of pricing lead pigments originated. The record shows that the Oil, Paint and Drug Reporter is the nation's oldest trade journal, and that it is unquestionably regarded as an authoritative source of information on market prices and marketing practices in the lead pigments and related industries. Thus, the fact that there appeared in this publication on a certain date information showing fundamental changes in methods of pricing in the industry is relevant and material to the issues in this proceeding, and, although the exhibits admittedly are hearsay, they are admissible for the reason that they are hearsay of a kind "that usually affects fair-minded men in the conduct of their daily and more important affairs." (*John Bene & Sons, Inc.* v. *Federal Trade Commission*, 229 Fed. 468).

The respondent's exceptions Nos. 39, 40, 41, 42, 43, 44 and 45 relate to the admission in evidence of a large number of documents detailing the early relations of American Smelting and Refining Company, respondent National Lead Company and a number of other concerns which figured prominently in the mining, smelting, refining and processing of lead, together with certain contracts between American Smelting and Refining Company, the respondents in this proceeding, and others. Some of these documents supply historic details of the relationship that existed between American Smelting and Refining Company and respondent National and bear directly on the allegations of Paragraph Seven A (8) of the complaint. As conceded by counsel in support of the complaint, others of the
1220 documents have little bearing upon the existence of

the alleged conspiracy among the respondents or the price discriminations charged in Count II of the complaint. However, they do relate directly to the acquisitions of competitors and others engaged in the lead pigments business involved in the charge against National in Count I of the complaint and serve to provide background information. They also tend to show the control of the market for metallic lead and the interdependence of these respondents upon the suppliers of lead and the prices which the respondents have paid for this commodity. The Commission is unable to perceive of any possible prejudice to the rights of the respondents as a result of the receipt of these documents and is of the opinion that they should remain in the record as a pertinent part of the background of the case.

In its exception No. 46 the respondent contends that the hearing examiner erred in receiving Commission's Exhibits 527 and 528, being copies of letters written in 1935 by one Albert Chatfield to the chairman of the board of directors and president, respectively, of respondent National Lead Company. The letters set forth the difficulties Chatfield was having in obtaining for the addressees 625,000 shares of the common stock of respondent Eagle-Picher. On the initial offer the documents were rejected by the hearing examiner upon the ground that they had not been sufficiently connected up, but when it later appeared that the addressee of one of the letters was chairman of the board of respondent National and was the owner of about 50,000 shares of stock in respondent Eagle-Picher, and that this stock was held in the chairman's name for respondent National at the time these letters were written, and when it further appeared that the board of directors of National Lead Company had made a formal offer to acquire Eagle-Picher, the hearing examiner reversed his earlier ruling and received the exhibits. In the circumstances shown to have existed these letters clearly are competent and material to establish a link in the chain of

National's alleged efforts to acquire control of its
1221 leading competitor in the sale of lead pigments, and the hearing examiner's ruling admitting them in evidence was correct.

It Is Ordered that the appeal of respondent National Lead Company from the rulings of the hearing examiner be, and it hereby is, granted in part and denied in part, as hereinabove indicated.

2. Appeal of Respondent The Sherwin-Williams Company.

This respondent's first exception has to do with the receipt in evidence of the letter dated December 14, 1933, from Mr. Rowe of National Lead Company to The Sherwin-Williams Company of Canada, Ltd., appearing in the record as Commission's Exhibit 525 and is in substance identical with respondent National's exception No. 31, which has been granted. This exception of respondent Sherwin-Williams will be granted for the same reasons.

Sherwin-Williams' exception No. 2 constitutes an objection to Commission's Exhibit 594-A and B on the ground that the document comprising this exhibit is a photostatic copy of Commission's Exhibit 662-S and T which was received under a stipulation between counsel. It does appear that Exhibit 594-A and B is the original of a document of which Exhibit 662-S and T is a duplicate. There was a difference in the identification of the two exhibits, however, Exhibit 662-S and T being described in the stipulation merely as a "two-page document issued by Sherwin-Williams Company", while Exhibit 594-A and B was definitely identified by the Commission's attorney-examiner who obtained it as Sherwin-Williams' lead and zilo price differentials for warehouses and stores, excepting Pacific Coast districts. Obviously, this description of the document is much more valuable to the record than the simple recitation that a list composing it is a "two-page document", and inasmuch as retention of the original cannot possibly prejudice the rights of respondent Sherwin-Williams, who does not deny the material facts stated in the identification, this exception will be denied.

1222 In its exception No. 3 Sherwin-Williams contends that the hearing examiner erred in failing to exclude from the record Commission's Exhibit 742, being a tabulation of less-than-carload freight rates applicable to the movement of certain lead pigments from and to a number of specified points, as of January 1, 1941. As stated by the respondent, this was an exhibit introduced in connection with the testimony of the witness, Hugh E. White, and the stipulation of counsel entered into at the time of the issuance of the amended complaint excluded from consideration under such amended complaint the testimony of Mr. White and the exhibits introduced in connection therewith. It appears, however, that the hearing examiner

probably did rely in part upon Commission's Exhibit 742 in his illustration of the relationships between the twenty-five cents quantity differential and the differences in freight, as between carload and less-than-carload shipments of dry white lead, given in paragraph 9 (e) of his recommended decision. In so doing, the hearing examiner erred, and the respondent's exception to his action in this respect is well taken.

Exception No. 4 relates to the receipt in evidence of Commission's Exhibit 793, being a map of the United States outlining the boundaries of the ten district offices of respondent Sherwin-Williams. At the time of its receipt, counsel in support of the complaint conceded that "there is no allegation on the part of the attorneys for the Commission that this is a zone map used in the pricing of lead pigments", but stated that "We propose to connect that up with the method of Sherwin-Williams Company of receiving orders and shipping orders to customers, which we will show, the areas from which they ship and from which they receive orders, and it is relevant and material as showing the method of doing business of Sherwin-Williams Company in connection with the sale of lead pigments". Certain evidence was thereafter introduced bearing on respondent Sherwin-Williams' method of doing business, but there is no explanation of the significance of the districts shown on this map, and, as far as the record shows, the map merely illustrates the location, for general administrative purposes, of Sherwin-Williams' dis-
1223 trict offices. Thus, the relevancy of this map is not apparent and it will not be considered in the Commission's disposition of this proceeding.

In its exception No. 5 Sherwin-Williams objects to the appearance in the record of a statement made by the respondent's counsel to the effect that Sherwin-Williams makes sales of white lead at retail to its customers through its retail stores as they are listed on Commission's Exhibit 652-A to L, inclusive, and that it regularly charges such customers its published delivered prices for the respective localities in which these stores are found. Objection to the appearance of the statement is based upon the argument that the statement relates to purely intrastate transactions and that the Commission has no jurisdiction over such transactions.

In disposing of this exception it is not necessary for the question of the Commission's jurisdiction over Sherwin-

Williams' intrastate sales to be determined. The admitted practices of Sherwin-Williams of charging its retail customers at certain designated localities the respondent's regular published prices applicable to such localities has a direct bearing on the question whether Sherwin-Williams actually used the zone delivered pricing system pursuant to the alleged conspiracy in which it is charged with having participated, and so is a matter to be considered. The hearing examiner's denial of the respondent's contention that this statement is immaterial to the issues in the case was correct.

Commission's Exhibits 652-A to L, inclusive, and 776-A to N, inclusive, are documents showing the locations of Sherwin-Williams retail paint stores to which the statement dealt with in the foregoing ruling relates, and the receipt in evidence of these exhibits is the subject matter of Sherwin-Williams' exception No. 6. The reasons for such exception are the same as those assigned in support of exception No. 5. For the same reasons given for the ruling on said exception No. 5, this exception will likewise be denied.

1224 Sherwin-Williams' exception No. 7 is that the hearing examiner erred in receiving in evidence Commission's Exhibits 490, 491 and 492, being copies of two contracts between Sherwin-Williams and American Smelting and Refining Company, providing for the purchase and sale, at a stated price, of certain quantities of corroding lead, and a copy of a letter from Sherwin-Williams to American Smelting and Refining Company concerning the purchase of lead. It is true, as the respondent contends, that the amended complaint in this proceeding does not directly charge Sherwin-Williams with having conspired with American Smelting and Refining Company in an effort to fix the price of pig lead, but these exhibits were not offered or considered for the purpose of establishing any such conspiracy. The proceeding does directly involve the relationship between pig lead, and its price, and lead pigments, and the contracts and correspondence to which this objection relates do show a course of dealing between Sherwin-Williams and American Smelting and Refining Company, and in this way contribute to a better over-all understanding of the lead pigments business. In the absence of any indication that the hearing examiner received these exhibits for any other purpose, his action cannot be said to have been erroneous.

It Is Ordered that the appeal of respondent The Sherwin-Williams Company from the rulings of the hearing examiner be, and it hereby is, granted in part and denied in part, as shown.

3. Appeal of Respondent The Glidden Company.

This respondent's appeal consists of an application for reversal of the hearing examiner's rulings striking from the record certain testimony of the witnesses, Paul E. Sprague and David N. Burruss, Jr. This testimony had to do with the respondent's effort to justify on a cost basis the price differentials shown to have been made by Glidden in selling its white lead-in-oil, dry white lead, red lead and litharge in carload, 5-ton and less-than-5-ton quantities.

1225 The Commission is convinced, after careful consideration of the record, that the hearing examiner's rulings were correct. The testimony of Mr. Sprague, vice president of respondent Glidden, in substance was that he knew that the cost of doing business with the small customers was enough higher than the cost of selling to the larger customers to more than justify the quantity differentials between the two. He admitted, however, that he had made no cost survey, and affirmatively stated that the only basis for his testimony was his general knowledge of the business. The testimony of Mr. Burruss was to the same general effect. This witness did say on direct examination that he had made a survey of Glidden's less-than-carload accounts, but on cross-examination he explained that his "survey" consisted of making inquiry of Glidden's credit department as to how much of their expense was applicable to the small accounts. He readily admitted that he did not know how the credit department obtained the information it later furnished him; that he had no idea as to what records were available as a source of the information; and, further, that the information he received from the credit department which served as the basis for his testimony was a mere verbal statement which did not purport to distinguish between the costs involved in producing or selling lead pigments in 5-ton lots and in quantities smaller than five tons.

The inadequacy of such testimony to justify price discriminations under Section 2 of the Clayton Act, as

amended, is obvious. Under this statute a person against whom a prima facie case of price discrimination has been made has the burden of proving affirmatively, if possible, that the discriminations made no more than "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are * * * sold or delivered". The evidence of the witnesses Sprague and Burruss being only general statements and conclusions based on general impressions and not on any definite cost factors fails completely to sustain in any affirmative sense the burden
1226 so placed on the respondent. Thus, the testimony, even if admitted, would have no substantial probative value and would avail the respondent nothing.

In the view of the Commission, however, this testimony, without further support, is wholly inadmissible for the reasons (1) it is pure hearsay, and not hearsay of a kind which would persuade prudent men to rely upon it in determining whether their costs of delivery were equal to or more than their price differentials; (2) the testimony, being hearsay, would provide counsel in support of the complaint no adequate basis for cross-examination of the witnesses concerning the factors which were taken into account in reaching the broad general conclusions; and (3) the acceptance of such testimony in justification of price discriminations shown to have been made would tend to impose upon counsel in support of the complaint the burden of showing by the books and records of a respondent that the discriminations shown to have been made were not justified, which burden may not be so imposed.

It Is Ordered that the appeal of respondent The Glidden Company from the rulings of the hearing examiner be, and it hereby is, denied.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

Issued: January 12, 1953.

1227 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman.
Lowell B. Mason.
John Carson.
Stephen J. Spingarn.
Albert A. Carretta.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on November 25, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in the sale of
1228 white lead, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of white lead, in violation of the provisions of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

After the filing of the respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it. Subsequently, on April 12, 1946, the Commission issued and afterwards served upon said respondents an amended complaint, charging them with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in the sale of various lead pigments, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of various lead pigments, in violation of the provisions of subsection (a) of Section 2 of said Clay-

ton Act, as amended. The respondents' answers to said amended complaint were duly filed, and it was stipulated by and between counsel in support of the amended complaint and the respondents, by their respective counsel, that the testimony and other evidence theretofore received in support of the original complaint (with the exception of certain specified testimony and other evidence, which were excluded) might be considered as a part of the record under the amended complaint to the same extent and effect as if said testimony and evidence had been introduced after the issuance of said amended complaint.

Thereafter, further testimony and other evidence in support of and in opposition to the allegations of said amended complaint were introduced before a substitute hearing examiner (the respondents having consented to the substitution of hearing examiners), and said testimony and other evidence were duly recorded and filed in the office of the Commission. In due course the proceeding regularly came on for final hearing before the Commission upon the amended complaint, the respondents' answers thereto, the testimony and other evidence, the hearing examiner's recommended decision and exceptions thereto, briefs 1229 and oral arguments of counsel, including briefs and arguments in support of and in opposition to the respondents' appeals from a number of rulings of the hearing examiners with respect to the receipt of documentary evidence and other testimony; and the Commission, having duly considered the matter and having disposed of the exceptions to the recommended decision and the respondents' appeals, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts.

Paragraph One: (a) Respondent National Lead Company, hereinafter sometimes referred to as "National", is a New Jersey corporation, with its principal offices located at 111 Broadway, New York, New York. This respondent is the largest producer and seller of lead pigments in the United States, and it presently operates factories producing lead pigments at Brooklyn, New York (white lead, red lead and litharge), Perth Amboy, New Jersey (white lead), Philadelphia, Pennsylvania (white lead, red

lead and litharge), Charleston, West Virginia (red lead and litharge), Atlanta, Georgia (red lead and litharge), Chicago, Illinois (white lead, red lead and litharge), St. Louis, Missouri (white lead, red lead and litharge), San Francisco, California (white lead, red lead and litharge), Los Angeles, California (red lead and litharge), and Dallas, Texas (red lead and litharge). During the period from 1936 to 1942, respondent National accounted for between 60% and 63% of the shipments of white lead-in-oil, from 30% to 35% of the dry white lead, basic carbonate, and approximately 50% of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8% of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53%. Respondent National is also a very large producer of titanium pigments, and in addition produces linseed oil and many different products composed principally of lead.

1230 (b) Respondent The Eagle-Picher Company, erroneously named in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation, with its principal offices located in the American Building, Cincinnati, Ohio. Respondent The Eagle-Picher Sales Company is a Delaware corporation, with its principal offices at the same address and is a wholly-owned subsidiary of respondent The Eagle-Picher Company. All of the acts of respondent The Eagle-Picher Sales Company referred to herein have been for the benefit and in behalf of respondent The Eagle-Picher Company and for the purpose of these findings, will be treated hereinafter as the acts of The Eagle-Picher Company. Both of these respondents are hereinafter sometimes referred to collectively simply as "Eagle-Picher".

Respondent Eagle-Picher is engaged in the business of mining, smelting, refining and selling metallic lead products, lead pigments and other articles of commerce. It maintains a factory producing basic carbonate of white lead, both dry and in oil, at East Chicago, Indiana (a factory formerly operated by respondent International Smelting and Refining Company and acquired by Eagle-Picher in 1946). Its factories producing red lead and litharge are operated at Joplin, Missouri and at Newark, New Jersey, and it produces basic sulphate of white lead at Galena, Kansas and Joplin, Missouri. Eagle-Picher

is engaged in mining lead ores in the so-called "Tri-State" area (a geographical area comprising the contiguous sections of Missouri, Kansas and Oklahoma) and operates plants reducing such ores to concentrates and metallic lead in and around Joplin, Missouri. This respondent is the second largest producer of lead pigments in the United States, and during the period from 1930 to 1946, it accounted for from 15% to 20% of the white lead-in-oil and from 8% to 12% of the dry white lead, basic carbonate, sold in the United States. Eagle-Picher is also a producer of lithopone, a product apparently sold in competition with lead pigments, and is a large producer and seller of zinc oxide and leaded zinc pigments consisting of a combination of white lead, basic sulphate, and zinc oxide.

1231 (c) Respondent Anaconda Copper Mining Company, hereinafter sometimes referred to as "Anaconda", is a Montana corporation, with its principal office located at 25 Broadway, New York, New York. Respondent International Smelting and Refining Company, hereinafter sometimes referred to as "International", is a Montana corporation, with its principal office at the same location, and it is a wholly-owned subsidiary of respondent Anaconda Copper Mining Company.

Respondent Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper, lead and zinc. Prior to 1936, dry white lead and white lead-in-oil were produced by Anaconda Lead Products Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda sales Company, another wholly-owned and controlled Anaconda subsidiary. In 1936, the assets and properties of Anaconda Lead Products Company were acquired by respondent International, and the former company was dissolved after having been engaged in the production and sale of white lead since 1920. From 1936 to the fall of 1946, lead pigments produced by respondent International were sold and distributed by that company or by Anaconda Sales Company, the division of business between the two depending upon the states in which business was done. From 1937 to 1941, respondent Anaconda (International) sold from 3% to 4% of the white lead-in-oil and from 10% to 19% of the dry white lead, basic carbonate, sold in the country. Its percentage of the national sales of white lead-in-oil and dry white lead, basic carbonate, combined, was 6.6% in 1938 and 8.8% in

1941. Neither respondent Anaconda nor any of its subsidiaries has ever produced red lead or litharge.

The principal officers of respondents Anaconda and International have always been the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Company were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own. All of
1232 the acts of respondent International, of Anaconda Lead Products Company, and of Anaconda Sales Company referred to in these findings were for and in behalf of respondent Anaconda and such acts will hereafter be treated as the acts of respondent Anaconda.

Respondent Anaconda (International) ceased the manufacture and sale of white lead, both dry and in oil, in July or August 1946, but it still produces lead ores and refined metallic lead.

(d) Respondent The Sherwin-Williams Company, hereinafter sometimes referred to as "Sherwin-Williams", is an Ohio corporation, with its principal office located at 101 Prospect Avenue, N. W., Cleveland, Ohio. This respondent operates a factory producing white lead, red lead and litharge in the metropolitan area of Chicago, Illinois, and is one of the largest, if not the largest, manufacturers and sellers of mixed paints and related items in the United States, operating numerous paint producing plants and warehouses throughout the country. Respondent Sherwin-Williams operates more than two hundred retail stores located throughout the country selling mixed paints, lead pigments and related items to consumers and the general public.

A substantial portion of the lead pigments produced by Sherwin-Williams is used by it directly in the manufacture of paint and related products, and the remainder of its production is sold and shipped to others. This respondent is not engaged in the sale of red lead or litharge to the battery manufacturing industry, but it is engaged in the sale of such products to paint manufacturers and other users. Sherwin-Williams is also a producer of a number of pigments said to be in competition with lead pigments, including lithopone.

(e) Respondent The Glidden Company, hereinafter sometimes referred to as "Glidden", is an Ohio corporation, with its principal offices in the Union Commerce

Building, Cleveland, Ohio. This respondent operates
1233 a white lead producing plant in Scanton, Pennsylvania, and a lead refining and red lead and litharge producing plant in Hammond, Indiana, in the Chicago, Illinois, switching area. Like Sherwin-Williams, respondent Glidden is a large producer and seller of mixed paints and related items and operates some thirty retail stores selling mixed paint, lead pigments and related products directly to consumers and the general public. From 1932 to 1943, it accounted for from 2% to 9% of the National sales of white lead-in-oil, from 8% to 18% of the sales of dry white lead, basic carbonate, and from 4% to 8% of the red lead and litharge sales in the country. Glidden's white lead producing plant was formerly operated by the Euston Lead Company, now a division of Glidden, and was acquired by Glidden in 1925; and its red lead and litharge producing plant was formerly operated by Metals Refining Company, now also a division of Glidden, and was acquired by Glidden in 1929. Respondent Glidden probably is the largest domestic producer in the United States of lithopone.

(f) Other organizations to which references will be made in these findings which are not respondents herein are Lead Industries Association and American Smelting and Refining Company.

Lead Industries Association is a voluntary unincorporated trade association organized in 1928 to serve the interests of those who mine, smelt, refine and manufacture lead and lead products, including lead pigments. It is composed of a mining division, a smelting and refining division, a lead pigments division and a metallic lead products division. During and preceding the period of the National Recovery Administration, the lead pigments division of the association was further separated into a white lead-in-oil committee and a dry products committee, the latter being further divided into an oxide committee and a dry white lead committee. Members of the Lead Industries Association comprise practically the entire lead mining, smelting and refining industry of the United
1234 States, as well as most of the industries using lead as a basic raw material, including manufacturers of lead pigments, lead sheets, pipe, shot, solder and related items.

American Smelting and Refining Company is a corpora-

tion, with its principal office and place of business located in New York, New York. This company, hereinafter sometimes referred to as "A. S. & R.", is the world's largest smelter and refiner of lead, producing between 30% and 40% of the entire world's supply of refined lead and accounting for more than half of the domestic supply. A. S. & R. operates lead smelters at East Helena, Montana, Selby (San Francisco), California, El Paso, Texas, Leadville, Colorado, Murray, Utah and East St. Louis, Illinois, which process ores and concentrates from four hundred to five hundred lead mines. This company purchases from the mines 80% to 90% of the lead ore which it processes and most of its ore of United States origin is so purchased. It publishes daily the prices at which it buys lead ore and the prices at which it sells pig lead on the same day. The position of A. S. & R. in the domestic lead market is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the basis for quoting spot carload prices on red lead and litharge.

Paragraph Two: Each of the respondents named in subparagraphs (a) to (e), inclusive, of Paragraph One is now and for many years last past has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, selling and shipping lead pigments manufactured at the various producing points hereinabove set forth to customers located in States of the United States other than the states of production (except that respondents Anaconda and International have not engaged in the lead pigments business since the fall of 1946). Each of said respondents seeks to enjoy and does enjoy national distribution of lead pigments and other products manufactured by it, except that respondents Eagle-Picher and Anaconda do only a limited
1235 amount of business on the Pacific Coast and in the states west of the Rocky Mountains and except that respondent Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast.

Together the respondents account for practically the entire production of lead pigments in the country, there being only a few small producers of such products for sale in commerce in the United States other than said respondents. It is to these respondents that purchasers and consumers throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available for

shipment in commerce. The respondents also account for a substantial portion of the national production of and trade in commerce in a number of competing products, including lithopone, zinc oxide and titanium, used as pigments in mixed paints and for other similar purposes.

Paragraph Three: The term "lead pigments" as used in these findings includes all of the various carbonates and sulphates of lead, and oxides, hereinafter more particularly described, whether or not such products are actually used as pigments.

(a) Dry white lead, basic carbonate, is a fine white powder produced from metallic lead, used extensively as a pigment in paints and protective coverings as well as in the manufacture of ceramics, putty and other products. It is sold principally to paint and ceramic manufacturers for use by them as a raw material in further manufacturing processes, and as so sold is customarily packaged in 600-pound containers.

(b) Dry white lead, basic sulphate, is a white pigment similar in appearance to dry white lead, basic carbonate, which may be produced either by processing metallic lead or by fuming lead concentrates without reducing the basic raw material to metallic lead. It is marketed in bags of fifty pounds or steel containers of from four hundred and twenty-five to six hundred and twenty-five pounds, and is used extensively either alone or as combined with zinc oxide to form leaded zinc oxide in the manufacture of mixed paints.

1236 (c) White lead-in-oil is the term customarily used to refer to white lead, basic carbonate, with linseed oil added to form a paste. It is sold principally to dealers for resale to painters and members of the general public, and its primary ultimate use, after being mixed with additional oil, mineral spirits and dryers, is as an exterior house paint. White lead-in-oil, when so mixed, is now and for many years has been known in the trade and by consumers as a protective covering of the finest quality for houses and other wooden structures.

(d) Litharge is a sub-oxide of lead having the approximate chemical formula PbO, which is produced by heating metallic lead in the presence of air in a furnace. There are many different grades and types of litharges, depending upon the use for which they are manufactured. Litharge is used in the manufacture of paints and varnishes, in the

"sweetening" of gasoline by the petroleum refining industry, and in the production of agricultural insecticides. The largest use of litharge is in the manufacture of electric storage batteries where it is the basic raw material for both the negative and positive battery plates. The litharges sold to the battery manufacturing industry by the respondents (except for the respondent Anaconda (International), who has never sold litharges, and the respondent Sherwin-Williams, who sells no litharge to battery manufacturers) are sometimes referred to in the trade and by the respondents as oxides of lead. Litharge is customarily sold to industrial consumers in containers of six hundred pounds.

(e) Red lead, having the approximate chemical formula Pb_3O_4, is produced by a further heating and oxidation of litharge, and is manufactured in several grades and qualities, depending upon the extent to which the roasting and refining processes are carried. Red lead is now and for many years has been regarded as the finest pigment for metal protective paint and is used to a large extent as a pigment in the paint manufacturing industry. It is also used extensively in the manufacture of electric stor-
1237 age batteries, in producing agricultural insecticides, and in petroleum refining. Red lead is also mixed with linseed oil to form a paste known as red lead-in-oil which is sold largely to dealers for resale to painters and consumers for use directly as a paint after the addition of oils and dryers.

(f) A number of other miscellaneous products are likewise known to the industry as lead pigments, including blue lead, a form of basic sulphate of lead produced by the fuming of lead concentrates; orange mineral, a pigment produced by further processing red lead or white lead, basic carbonate; and grinders' lead-in-oil, which is white lead, basic carbonate, mixed with linseed oil to form a paste of thinner consistency than white lead-in-oil, and is ordinarily sold to the paint manufacturing industry.

(g) Pig lead is not a lead pigment, but is the term used to describe metallic lead which is customarily marketed in the form of pigs or bars containing approximately ninety pounds each. It is the basic raw material from which lead pigments are manufactured, except that some basic sulphates and litharges are produced from fuming lead concentrates. Except as to respondent Anaconda, whose supplies of lead were derived from its own smelters and re-

fineries, all of the respondents herein during all of the time covered by these findings have purchased the major part of their requirements of pig lead on the open market. It appears, however, that during the period from 1930 to the date of the hearings in this proceeding respondent Eagle-Picher at various times produced as much as 66⅔% and as little as 10% or 15% of its own requirements of lead.

Paragraph Four: (a) Respondent National Lead Company was formed on or about December 8, 1891, by the acquisition of the physical properties and stock ownership of Cornell Lead Company, of Buffalo, New York, The National Lead & Oil Company, of New York, New York, Atlantic White Lead & Linseed Oil Company, of New York, New York, Salem Lead Company, of Salem, Massachusetts, The J. H. Morley Lead Company, of Cleveland, Ohio, The Eckstein White Lead Company, of Cincinnati, Ohio,
1238 Anchor White Lead Company, of Cincinnati, Ohio, Maryland White Lead Company, of Baltimore, Maryland, American White Lead Company, of Louisville, Kentucky, Kentucky Lead and Oil Company, of Louisville, Kentucky, Southern White Lead Company, of Chicago, Illinois, D. B. Shipman White Lead Works, of Chicago, Illinois, Southern White Lead Company, of St. Louis, Missouri, St. Louis Lead and Oil Company, of St. Louis, Missouri, Collier White Lead and Oil Company of St. Louis, Missouri, and Red Seal Castor Oil Company, of St. Louis, Missouri, all of which companies were previously engaged in the manufacture and in the sale and distribution of white lead, linseed oil and kindred products, and the stock ownership of which had been in or controlled by the National Lead Trust. In addition and at the same time National Lead Company acquired controlling stock interests in St. Louis and Zocatecas Ore Company, St. Louis Smelting and Refining Company, Western White Lead Company, John T. Lewis & Bros. Company, Beymer Bauman Lead Company, Fahnestock White Lead Company, Pennsylvania White Lead Company, Armstrong-McKelvy Lead & Oil Company, Davis-Chambers Lead Company, The American Oxide Company, Union White Lead Manufacturing Company, Brooklyn White Lead Company, Bradley White Lead Company, Lenox Smelting Company, Jewett White Lead Company, Ulster Lead Company, and Rio Grande Smelting Company.

In February 1906, respondent National acquired all of the stock of United Lead Company, which company had been organized in 1903 by Messrs. Grant Hugh Brown, Daniel Guggenheim and Thomas Fortune Ryan, and which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. Most of the concerns so acquired by National through the purchase of United had been previously offered to National by Messrs. Guggenheim, Ryan and H. H. Rogers, the first named individuals being directors of American Smelting and Refining Company. At this time and until 1911, American Smelting and Refining Company was represented on respondent National's Board of Directors by Daniel Guggenheim, Murray Guggen-
1239 heim and Edward Brush, who were also directors of American Smelting and Refining Company. In March 1906, National acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska, and in July 1912, it acquired all of the stock of Matheson Lead Company. In 1915, the River Smelting and Refining Company was organized jointly by National and Stone & Webster. In 1916, National acquired all of the stock of Bass-Hueter Paint Company; in January 1919, it acquired the properties and assets of Hirst & Begley Company; and sometime between 1931 and 1933, it acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia. In the 1930's, also, respondent National acquired the properties of Wetherill & Bros., producing lead pigments in Philadelphia, Pennsylvania.

Prior to these several acquisitions by National Lead Company there were in the United States eighteen or twenty producers of white lead who were selling their products in the various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged a number of the existing plants. The names of some of the acquired properties were retained and the properties were thereafter operated by National as branches.

(b) By 1930, National Lead Company had become a predominant factor in the lead pigments industry. There is evidence that at about this time National sought to fur-

ther enhance its position in the industry by the acquisition of the assets and properties of its largest competitor, respondent Eagle-Picher. It was shown that beginning in July of 1930 and continuing from time to time through June 13, 1932, respondent National bought in the name of E. J. Cornish, Chairman of the Board of Directors of National Lead Company, 44,900 shares of the common stock of respondent Eagle-Picher, and that in 1931 National made an unsuccessful attempt to purchase the entire assets and good will of The Eagle-Picher Company. It was not shown
that National ever actually controlled respondent
1240 Eagle-Picher or that it was ever represented on the latter's Board of Directors, but there is evidence that as late as 1935 Mr. Cornish and F. M. Carter, then president of National, were seeking to secure for National a controlling stock interest in respondent Eagle-Picher. There is further evidence of close relations between these two respondents, particularly during the period from 1931 to 1941. In 1937, for example, Eagle-Picher's executive vice president, Mr. W. R. Dice, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. F. B. Wormser, secretary of the Lead Industries Association, had invited him. The record further shows that Eagle-Picher's files contained National's price changes on the Pacific Coast and that in 1940, Eagle-Picher submitted labels, prices and descriptions of its new white lead paint to National and referred to a previous conversation over the telephone about this matter. This was followed by a luncheon between the interested parties. At one time Eagle-Picher's chief chemist, Mr. Frank L. Chinery, wrote to Mr. Rose of National suggesting an increase in Federal specifications of the non-volatile content of flatting oil to 12% "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications" (Comm. Ex. 691), and in 1941, National wired Eagle-Picher its Manila prices for white lead-in-oil and red lead as follows:

"Effective immediately prices Manila white lead-in-oil and red lead dry in twenty-five pounds increased half cent now ten and a half cents C1F terms net 60 days" (Comm. Ex. 701).

Various other instances of similar cooperation between these two competitors were shown to have occurred.

(c) In February 1906, at the time National Lead Com-

pany acquired the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which A. S. & R. was to sell and National was to buy (a) all of the latter's requirements of corroding pig lead (a very pure form of lead) except so much as National's plant
1241 located at Collinsville, Illinois supplied, not exceeding 30,000 tons per year, and (b) 85% of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. A. S. & R. was to furnish these requirements up to 85% of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company. If National's Collinsville smelting plant (formerly belonging to the St. Louis Smelting and Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to A. S. & R. at 5% less than the latter's prevailing price. For common pig lead, the price to be paid by National under this contract was to be the average of A. S. & R.'s lowest daily schedule of prices for the respective qualities and brands specified in National's orders for the calendar month preceding the month of shipment for fifty tons or more, on 30-day delivery, at St. Louis and New York City, respectively, provided that if this price was more than 1.075 cents per pound above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said London average, plus the differential of 1.075 cents, which differential was based on the prevailing tariff. The price for corroding pig lead was to be $2.00 per ton in excess of the price for common pig lead (Comm. Ex. 93-A-G, inc.). The significance of this contract in relation to the future prices of white lead in the industry is shown by a stipulation entered into by and between counsel that "the cost of its (National's) inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock is the most important single factor in its (National's) determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead" (Tr. 20).

Concurrently with the acquisition of the stock of United Lead Company by National Lead Company and with the

execution of the foregoing contract between respond-
1242 ent National and American Smelting and Refining Company, American Smelting and Refining Company entered into a contract with Hoyt Metal Company, a constituent company of National, under which Hoyt was to purchase and A. S. & R. was to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. This contract contemplated deliveries of not more than eight hundred tons of antimonial lead per month, and the price to be paid by Hoyt for lead shipped to it each month was to be the average daily price of common desilverized lead as quoted in said month by A. S. & R. for lots of fifty tons or more for delivery in St. Louis and New York City, respectively, within thirty days, with the same provision for adjustment with the London Metal Exchange quotations as that contained in the A. S. & R.-National contract with respect to common pig lead (Comm. Ex. 94-C-G, inc.).

The contract between National and A. S. & R. expired in 1921, whereupon the companies signed a contract of mutual release and made further arrangements whereby National thereafter purchased pig lead from A. S. & R. and from others on short-term contracts at a spot price or at an average monthly price based on A. S. & R.'s daily quotations. As stated by the former head of American Smelting and Refining Company, the reason given by National's president for not continuing the 1906 contract was that one company (A. S. & R.) had more lead to sell than any other in the United States and the other company (National) was the largest consumer of lead in the United States, and "there isn't enough lead to supply the National Lead's demands unless we (National) buy from the A. S. & R. and there aren't enough consumers to use all of the A. S. & R. production unless the National Lead takes some of it", and, further, that "We, the National Lead, do not want to be bound by a certain amount from you (A. S. & R.) —that handicaps our ability to buy perhaps at the lowest price, which is our ultimate objective, and on that account we feel that it is wiser for us not to be bound to take any specific amount" (Tr. 4084).

(d) On February 3, 1938, respondent National Lead Company entered into a contract with E. I. duPont de
Nemours & Co., Inc., concerning the manufacture and
1243 packaging of white lead-in-oil by National for duPont, which contract was similar to one which had been

in effect between the parties since 1924. The principal difference was that the payments to National by duPont were to be increased over those which would have been made under the 1924 contract by not more than $25,000 per year. Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and titanium which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages. The raw material was furnished by duPont and the lead-in-oil belonged to it for sale or use, subject to payment of the aforesaid processing and shipping charges (Comm. Ex. 797-C and D). The contract contained no provision for the observance by duPont of prices charged by National or others for lead-in-oil, nor is there direct evidence of any express agreement between the parties to that effect. It is shown, however, that duPont based its calculations of the amounts to be paid under the new contract on National's card prices for lead-in-oil and subsequently requested National to furnish its card prices and changes to duPont's branches (Comm. Ex. 533). Thereafter, duPont requested a periodical letter from National "covering the price to be in effect for the quarter" (Comm. Ex. 534), and such a letter from National to duPont, dated September 13, 1940, is in evidence as Commission's Exhibit 535. Moreover, a subsequent change in discount terms announced by duPont met the full approval of Mr. Harold Rowe, one of National's vice presidents, who wrote National's Chicago branch about it and suggested that "Perhaps others in the industry will follow this good example * * *" (Comm. Ex. 538). National represented duPont in discussions concerning a proposed supplemental code for the lead pigments division of the lead industry under the N. R. A., hereinafter discussed in more detail, and duPont was shown to have been "willing to go along with anything which was agreeable to the others" of the Lead Industries Association to which duPont did not belong (Comm. Ex. 506-D).

1244 Paragraph Five: As a direct result of the acquisitions hereinabove described, culminating in the disappearance from the field of some fifty competitors in the period from 1891 to 1935, respondent National Lead Com-

pany acquired a predominant position in the lead pigments industry, and as a result of its close cooperation with respondent Eagle-Picher and its contracts with American Smelting and Refining Company National's dominant power was materially increased. The record shows that by 1938 National and Eagle-Picher had obtained more than 68% of the white lead, dry and in oil, business (not including basic sulphate of lead) and more than 50% of the oxide business, in the United States. The consumption of pig lead by these two respondents was approximately 50% of the total produced and sold for the manufacture of lead pigments in the country. And the price of lead pigments announced and maintained by National and Eagle-Picher as a consequence of their dominating positions had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get. Under its contract with American Smelting and Refining Company, National acquired control of 85% of A. S. & R.'s domestic production of pig lead and restricted its own use of pig lead produced by its subsidiary, the St. Louis Smelting & Refining Company, to 30,000 tons per year, thus limiting the competition with A. S. & R. from this plant. Under the same contract A. S. & R. secured 85% of National's consumption of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might require, and under the contract between A. S. & R. and Hoyt, National acquired control over all of A. S. & R.'s output of antimonial lead; and as a result of both of the contracts A. S. & R. thereafter refrained from taking any further interest in the manufacture of lead pigments. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of the domestic production. They fixed a monthly average which tended to prevent quantity sales of pig lead on a price rise and, consequently, tended to reduce returns to miners of lead ores. On the other hand, the ar-
1245 rangements, through a substantial contraction of supply, confined the price on a major part of the United States consumption of pig lead to an average monthly price and thus prevented the basing of prices on daily market fluctuations and restricted opportunities of buying pig lead at lower prices. These effects on prices of pig lead were

obviously trade restraining and monopolistic. National's arrangements since 1921, when its 1906 contract with A. S. & R. expired, have been through short-period contracts which have had the same effect as the original contract.

In the light of the circumstances, the Commission is of the opinion, and finds, that the purpose and effect of National's acquisitions and of its arrangements and cooperation with American Smelting and Refining Company and with respondent Eagle-Picher was to substantially control the lead pigments industry and to regulate prices of pig lead and lead pigments; and that the purpose and effect of its relations with duPont was to establish an understanding that the latter would not deviate from National's prices in the sale of white lead-in-oil and would cooperate with National to maintain price uniformity in the sale of this product, which National processed for it under contract.

Paragraph Six: (a) By 1933 there were still in operation in the United States less than a dozen white lead producing plants. At that time there remained plants in San Francisco, operated by respondent National and W. P. Fuller & Son, an independent; in Chicago, operated by National and respondent Sherwin-Williams; in East Chicago, Indiana, operated by respondent Anaconda's subsidiary, respondent International Smelting and Refining Company; in Perth Amboy, New Jersey, St. Louis and Philadelphia, all operated by National; in Scranton, Pennsylvania, operated by respondent Glidden; and in Cincinnati, operated by respondent Eagle-Picher. In 1933, there remained plants producing red lead or litharge for sale in commerce in Chicago, operated by National, Glidden, and Hammond Lead Products Company (former proprietors of Metals Refining Company, acquired by Glidden in 1929); in 1246 St. Louis, operated by National; in Joplin, Missouri, operated by Eagle-Picher; in Brooklyn, operated by National; in Newark, New Jersey, operated by Eagle-Picher; in Philadelphia, operated by National; in Charleston, West Virginia, operated by National (formerly belonging to Evans Lead Company); in San Francisco, operated by National and W. P. Fuller & Son; and in Los Angeles, operated by Morris P. Kirk & Sons, a subsidiary of National.

(b) Although the number of lead pigment producing plants had been reduced materially by 1933, it does appear

that up to that time the industry had retained some vestiges of localized pricing of lead pigments. With respect to white lead-in-oil and other lead pigments packaged in steel kegs containing one hundred pounds or less, a system of differential or warehouse points was commonly employed. Commission's Exhibit 659-C to P, inclusive, is a list of the delivery and equalization points of the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia and St. Louis branches of National Lead Company. The sheets comprising this list are dated as far back as December 30, 1920, but the notations thereon indicate that they were revised up to as late as March 30, 1933. They show five hundred and eighty-nine different towns and localities located in forty different states as free delivery or equalization points. To the points marked either "D" or "E" lead pigments were quoted at the base price, with the addition of whatever freight differential in fractional cents per pound appears opposite each point on the list. To all other towns and localities, excepting those otherwise designated, freight was equalized with the nearest equalization point, marked on the list with an "E". Thus, on Commission's Exhibit 659-O there appears only one town each in the States of Alabama, Arkansas, Kentucky and Louisiana. In quoting to a customer in Alabama, for example, one-quarter of a cent per pound was first added to the base quotation and then the freight was calculated to the customer's destination. In the event the rate to the destination was more than the freight rate to Mobile, the equalization point, the additional sum by which the freight rate was more than the rate of Mobile was added to the delivery price.

1247 It is readily apparent that this method of quoting prices, requiring knowledge of all of the different free delivery and equalization points in the country and of the additions applicable to each of them, together with the freight rates to the points and to all of the other cities and towns not listed as delivery or equalization points for purposes of the freight equalization calculation, was a highly complicated method in which a seller could never be sure in advance of what his competitor was quoting unless he had advance knowledge of his competitor's listed points and of the freight rates used in making his calculations.

(c) Up to 1933, there were also prevalent in the industry other practices which naturally affected the cost of

lead pigments to purchasers. At times, for instance, dry white lead was sold on differential contracts under which prices were quoted at fixed differentials over the prevailing market price of pig lead, the basic raw material. Guarantees were also customarily entered into by the sellers, protecting purchasers over quarterly periods against declines in prices, not only as to the dry pigments sold in barrels and drums but, also, as to white lead-in-oil and the so-called keg products. With respect to oxides, red lead and litharge, differential contracts had been employed for several years covering sales to both carload and less-than-carload purchasers. The differentials to carload purchasers of these products had been in the range of $1.50 and $2.50 per hundred pounds, respectively, over the price of pig lead, but apparently there had been no common understanding in the industry as to which quoted price of pig lead was to be used, and the differentials were not uniformly $1.50 on litharge or $2.50 on red lead of standard grades. As nearly as can be determined from the fragmentary documents on this subject and the imperfect recollections of witnesses who testified on former practices in the sale of oxides, territorial differentials and zones were not employed prior to 1933, and on many transactions freight was charged to the customer or paid by him. Prior to 1933, prices on the Pacific Coast appear to have been below those in the East.

1248 With respect to all of the pig lead pigments, there was before 1933 a diversity of practices among the various respondents as to the time within which orders might be accepted for shipment at the old price following an advance in price and as to datings of invoices, giving purchasers the benefit of such old price. As regards dry white lead, there was no provision for quantity discounts, nor was there a higher differential for the Pacific Coast.

(d) Such was the general condition with respect to prices and terms and conditions of sale of lead pigments in the industry at the time the respondents began meeting together in 1933 for the ostensible purpose of considering the drafting of a supplemental code of fair competition for the lead pigments industry.

Paragraph Seven: (a) The respondents in this proceeding, with the exception of respondents Anaconda and International, and a number of other companies, including mining companies, smelters, refiners and manufacturers of

lead products generally, have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent International Smelting and Refining Company, became a member in 1929. The Lead Pigments Division of the Lead Industries Association, composed of the manufacturers of lead pigments, including the respondents, was the medium through which the discussions and group actions which were destined to revolutionize the pricing practices and methods of the respondent, took place.

(b) The chairman of the Lead Pigments Division of the Association was Mr. F. M. Carter, president of respondent National Lead Company. The chairman of the White Lead-in-Oil Committee of this division was at first Mr. Willard E. Maston, vice president of respondent Eagle-Picher, and later Mr. Carter. The chairman of the Dry Products Committee of the Lead Pigments Division was also Mr. Carter, president of respondent National. In later meetings the Dry Products Committee apparently was further subdivided into a Lead Oxide Committee, which
1249 represented the red lead and litharge producers as distinguished from the white lead producers, and its chairman was Mr. Harold Rowe, then assistant to the president of respondent National Lead Company. In any event, the Lead Pigments Division of the Lead Industries Association and its various subdivisions all constituted practically the same group, respondent National being represented primarily by its president, F. M. Carter, and the assistant to its president, Harold Rowe; respondent Eagle-Picher, by Messrs. Bendelari, its president, and Roosevelt and Maston, its vice presidents; respondent Glidden, by its vice president, Paul E. Sprague; respondent Sherwin-Williams, by its vice president, S. B. Coolidge, Jr.; and Anaconda Lead Products Company, a subsidiary of respondent Anaconda Copper Mining Company, by its sales manager, F. O. Case. The participation of these representatives in various meetings is vividly shown by the minutes appearing in the record, and is clear that all of the respondents (respondent Anaconda, by its subsidiaries) participated actively in the entire series of meetings hereinafter referred to, although one or more of the representatives may not have attended any one particular meeting. In connection with the activities of the association during the N. R. A. period, Mr. F. E. Wormser, secretary of the

association, acted as secretary to the Code Authority and of the Committees and received reports and otherwise functioned as association representative.

Paragraph Eight: For the purpose of drafting a supplemental code of fair competition for the lead pigments division of the lead industry under the National Industrial Recovery Act, the White Lead-in-Oil Committee and the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association met on various occasions between July 1933 and January 1934. A great many topics were discussed at those meetings, including terms and conditions of sale of lead pigments, the agency or consignment method of selling white lead-in-oil, freight and zoning problems, and others.

1250 (a) At meetings held on July 19 and July 20, 1933, a draft of a supplemental code had been prepared, but the minutes of those meetings show that so many questions regarding trade practices were raised that it was agreed the committee should meet again on August 8 for further discussions. As disclosed by the minutes of its meeting held on August 8, the Dry Products Committee, presided over by Mr. Harold Rowe, adopted, among others, the following rules and took the following action applicable to lead oxides:

"1. Red lead over 90% true red lead shall be sold at the following premiums over grades with lower true red lead content:

90% to 98% true red lead $ .25 per cwt.
98% and over true red lead $ .50 per cwt.

"2. Only two grades of guaranteed red lead shall be sold, i.e. grinders red lead guaranteed 95% and red lead guaranteed 98%. Under 95% red lead may be labeled as desired.

"3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

"4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

"5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale

for freight movements from Member's shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

1251 "6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

"7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries are to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

"8. Terms shall be 1% for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

"9. Delivery place shall be F.O.B. Member's shipping point.

"10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lb., rail tariffs to govern.

"11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

"12. The price paid for l.c.l. shipments shall be a flat price established by the seller.

"13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

"14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

1252 "15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

"16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

"17. No rebate on customers' stocks shall be allowed on account of price decline.

"18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

"19. On Government bids and on railroad (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established.

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	$1.00

"Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts, but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

"There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

"It was felt that in the case of off-grade material sold as such, a satisfactory differential below the standard grades should be developed.

"It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly
1253 true of large battery manufacturers who now are manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N.R.A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act 'to promote the fullest utilization of the present productive capacity of industries.' It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes." (Comm. Ex. 800-A, B and C.)

On the following day the Dry Products Committee took up the matter of practices to be included in a supplemental code for dry white lead, and it was then agreed to adopt as applicable to this product items Nos. 9, 11, 14, 15, 16, 17, 18, 19 and 20, as set forth in the minutes of the August 8 meeting of the Oxide group (Resps.' Ex. 135-A). Meeting again on September 6 and 7, the Dry Products Committee discussed the subject of uniform sales contracts specifically designed for use in selling dry white lead and red lead and

litharge, authorized the preparation of contract forms for this purpose, and discussed also the possibility of limiting the installation of facilities for the production of red lead and litharge. As to contracts covering the sale of dry white lead at a differential over pig lead prices it was agreed that the names of customers would be filed with the association (Comm. Ex. 801; Resps.' Ex. 136-B).

A further meeting of the Dry Products Committee was held on October 27, 1933, at which the third draft of a supplemental code was discussed and agreed upon. The following appears in the minutes of that meeting:

"After much study and discussion outlines setting forth Uniform Bases for the Sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots, respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

1254 "It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that "prices were to be agreed upon between buyer and seller.'

"A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman." (Comm. Ex. 504-B.)

Pursuant to the direction contained in these minutes, the secretary did consult counsel concerning the subject matter therein referred to, and, on October 30, 1933, he wrote to Mr. Carter, president of respondent National, as follows:

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead Oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

"He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of

Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

1255 "I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago." (Comm. Ex. 522-B.)

The telegram referred to in this letter reads as follows:

"Locke believes agreement upon suggested uniform basis of sale pending approval from Washington to code might place us on uncertain legal ground and might be embarrassing later stop He suggests one member use uniform basis and others follow voluntarily". (Comm. Ex. 522-A.)

On November 9, 1933, Mr. Carter wrote to Mr. Paul E. Sprague, vice president of Metals Refining Company (owned by respondent Glidden since 1929), sending copies to officials of respondents Eagle-Picher, International and Sherwin-Williams, concerning this subject, as follows:

"While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the common use of a contract which sets forth general terms, specifies grades, etc. but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation." (Comm. Ex. 523.)

On the next day Mr. Carter wrote to Mr. W. P. Fuller, Jr., president of W. P. Fuller & Son, in San Francisco, to the same effect, including in his letter this statement:

"Furthermore, it is believed by all members of the Pig ment Section who were present during the discus-

1256 sions, that it is desirable to have the privilege of using such uniform sales contract embodied as a feature in the code." (Comm. Ex. 517-A.)

The Oxide Committee of the Lead Pigments Division met again on December 14 and 15 and on December 27 and 28, 1933. According to the minutes of the meetings of December 14 and 15, the following action was taken:

"After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides

on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price for red leads containing 95%, 97% and 98% Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

"It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differentials over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

"Pending the adoption of our code, it was decided that no new commitments would be made:

1257 (1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.)" (Resps.' Ex. 137-A and B.)

The minutes of the meetings of December 27 and 28 show the following:

"There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

"Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in reissuing the information to members of the group he shall give only the names of the buyer and the seller.

"A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions." (Resps.' Ex. 138-A.)

(b) Simultaneously with the meetings of the dry prod-

ucts group hereinabove referred to, the White Lead-in-Oil Committee of the Lead Pigments Division of the association also held a number of meetings at which were discussed industry problems of selling white lead-in-oil and other lead pigments in kegs. Among the more important matters discussed at the initial meeting of this committee, held on August 9, 1933, and the actions taken thereon, as reflected by the minutes of that meeting, were the following:

1258 "The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, and report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—Price Guarantees, Spring Datings, deviation from terms, etc. This method of selling will in the future be described as the 'Agency Plan.'

"Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting.

"The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

1259 "The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion

as to the method which might be used—the following being suggested:

Capacity.
Last year's Government and State business.
Average last three years Government & State business.
Average last ten years Government & State business.

The group was asked to give this further thought." (Comm. Ex. 501-B and C.)

In the meeting of this committee, held on October 28, 1933, the following occurred:

"The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General Electric and other companies and was designed to correct destructive price cutting in the white lead-in-oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

"Freight and zoning problems were discussed without any understanding or agreement being made." (Comm. Ex. 505-A.)

In a letter to the general manager of E. I. duPont de Nemours & Co., Inc., dated September 8, 1933 (following a meeting of the committee on September 6, the minutes of which contain no reference to the agency or zone plans), Mr. Carter, president of respondent National, in referring to the fact that National was representing duPont in the code discussions, stated as follows:

1260 "The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expected to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as had been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example; where, under present conditions,

prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer." (Comm. Ex. 506-D.)

On September 14, 1933, Mr. Maston, as chairman of the White Lead-in-Oil Committee, wrote Mr. Wormser, secretary of the association, and representatives of certain of the respondents, enclosing what purported to be a zone map and a list of old freight differentials used in marketing white lead-in-oil. In this letter Mr. Maston stated:

"The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

"For your information file I am sending you a map and list of freight differential points." (Comm. Ex. 513-B.)

1261 In another letter to the secretary of the association, dated January 31, 1934, following the last meeting of the White Lead-in-Oil Committee during the N. R. A. period, Mr. Maston referred to another zone map as follows:

"I am enclosing Zone Map for the White Lead in Oil industry. I believe you will find it self-explanatory.

"When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

"From this map we will eventually build up an official freight arrangement for this division of the lead industry." (Comm. Ex. 519-B.)

The secretary of the association acknowledged receipt of this letter on February 2, 1934, stating:

"Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry." (Comm. Ex. 519-A.)

The map referred to in this letter was never produced and apparently was no longer in the files of the association, so that it does not appear in the record.

Paragraph Nine: The Code of Fair Competition for the Lead Industry was approved on May 24, 1934, and appears in the record as Commission's Exhibit 809. Article VII of this code, dealing with trade practice rules for the lead pigments division of the industry, was the final product of the meetings of the lead pigments committees of the Lead Industries Association above described. Section 1 of this article contained provisions against misbranding or misrepresentation of lead pigments, commercial bribery, induc-

ing a breach or cancellation of contract, guaranteeing the life or service of lead pigments, making false or derogatory statements regarding competitors, and selling lead pigments at a concession or using them to influence the sale of other merchandise. Section 2 of Article VII required 1262 each member of the industry producing lead pigments to file with the Code Authority a list of prices at which his products would be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule A of the code. Section 3 required that each producer of lead pigments submit to the secretary monthly reports of production, stocks on hand and total monthly shipments. Schedule A, attached to the code, contained three articles—one relating to conditions for the sale of lead oxides in lots of less than twenty tons, the second relating to conditions for the sale of lead oxides in lots of twenty tons or more, and the third relating to conditions for the sale of dry white lead, basic carbonate.

Nowhere in the code, nor in any preliminary draft of a code produced at the meetings of any of the committees, is there any reference to the use of zones or to territorial differences in the prices of lead pigments, or to the use of agency or consignment contracts or arrangements in the sale of white lead-in-oil. Schedule A did provide that in the sale of oxides in carload lots the price should be determined by adding a differential to the pig lead price quotations of American Smelting and Refining Company, and did set forth differentials between the different grades of red lead, but the matter of how prices were to be arrived at was for the most part entirely omitted. Furthermore, the record shows that shortly after the code was approved the respondents and other manufacturers of lead pigments requested and obtained from the National Recovery Administration an express exemption from all of the provisions of Section 2 of Article VII and from all of the requirements of Schedule A, so that at no time were prices or variations filed with the secretary of the association and at no time were the provisions of Article VII of the code or of Schedule A attached to the code in force or effect.

Paragraph Ten: (a) The evidence in the record discloses that the meetings and discussions hereinabove referred to, during the period from July 1933 to June 1934, resulted in understandings and agreements between and

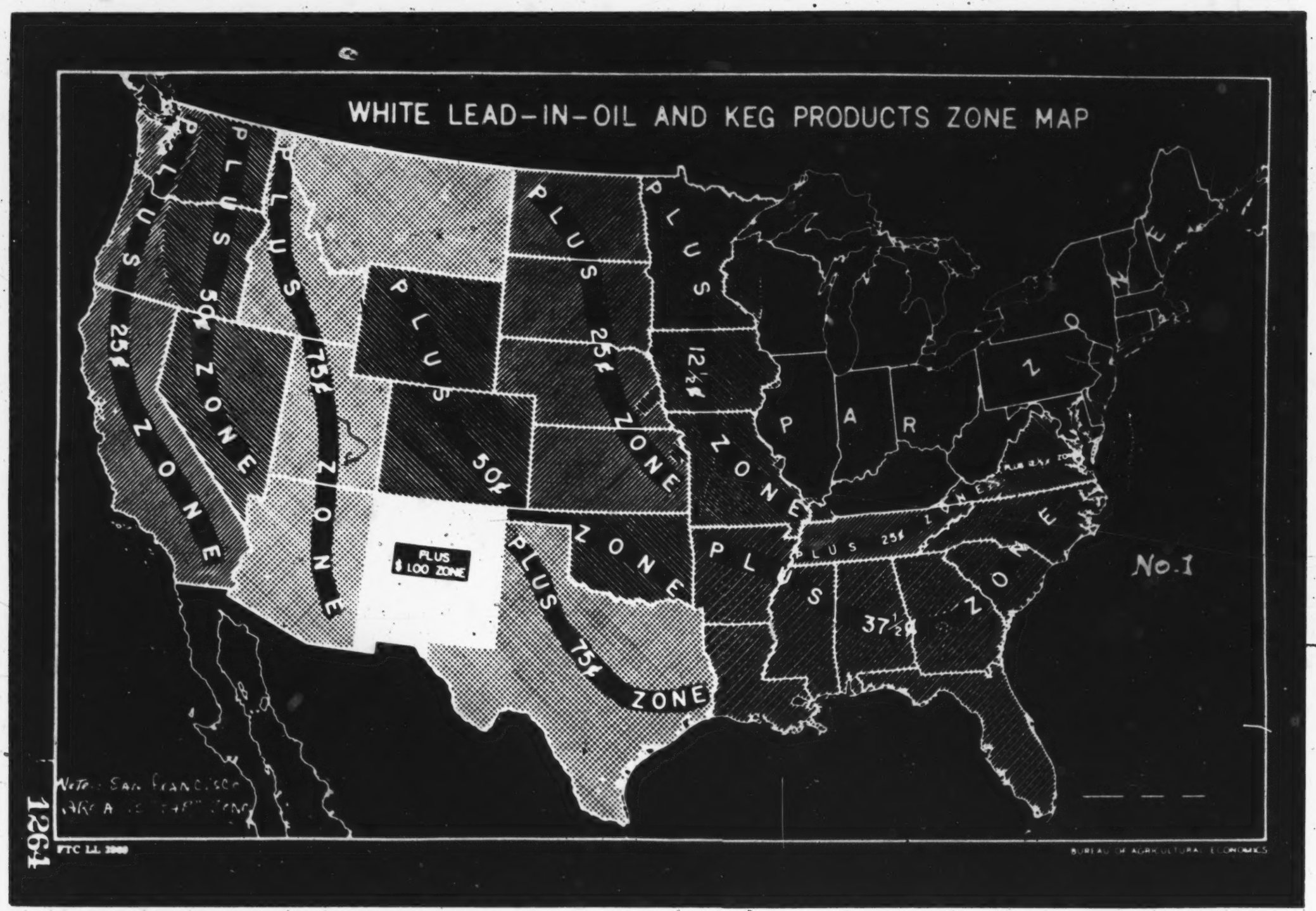
among the respondents to do the following specific
1263 things (except that respondents Anaconda and International did not participate in the agreements concerning red lead and litharge, which products they did not sell, and except that respondents Glidden and Sherwin-Williams did not take part in the agreement to use the agency or consignment method of selling white lead-in-oil):

(1) To sell white lead-in-oil and other lead pigments packaged in kegs or cans of one hundred pounds or less on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the White Lead-in-Oil and Keg Products Zone Map included in these findings.

(2) To sell dry white lead (both basic carbonate and basic sulphate) on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Dry White Lead Zone Map included in these findings.

(3) To sell red lead and litharge in drums or barrels and in quantities of less than twenty tons on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Less-Than-Carload Red Lead and Litharge Zone Map included in these findings.

(4) To sell red lead and litharge in drums or barrels and in quantities of twenty tons or more on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones, and the differentials applicable thereto are shown on the Carload Red Lead and Litharge Zone Map included in these findings.


WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP
PLUS 25¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS $1.00 ZONE
PLUS 12½¢ ZONE
PLUS 37½¢ ZONE
No. 1
Note: San Francisco
BUREAU OF AGRICULTURAL ECONOMICS

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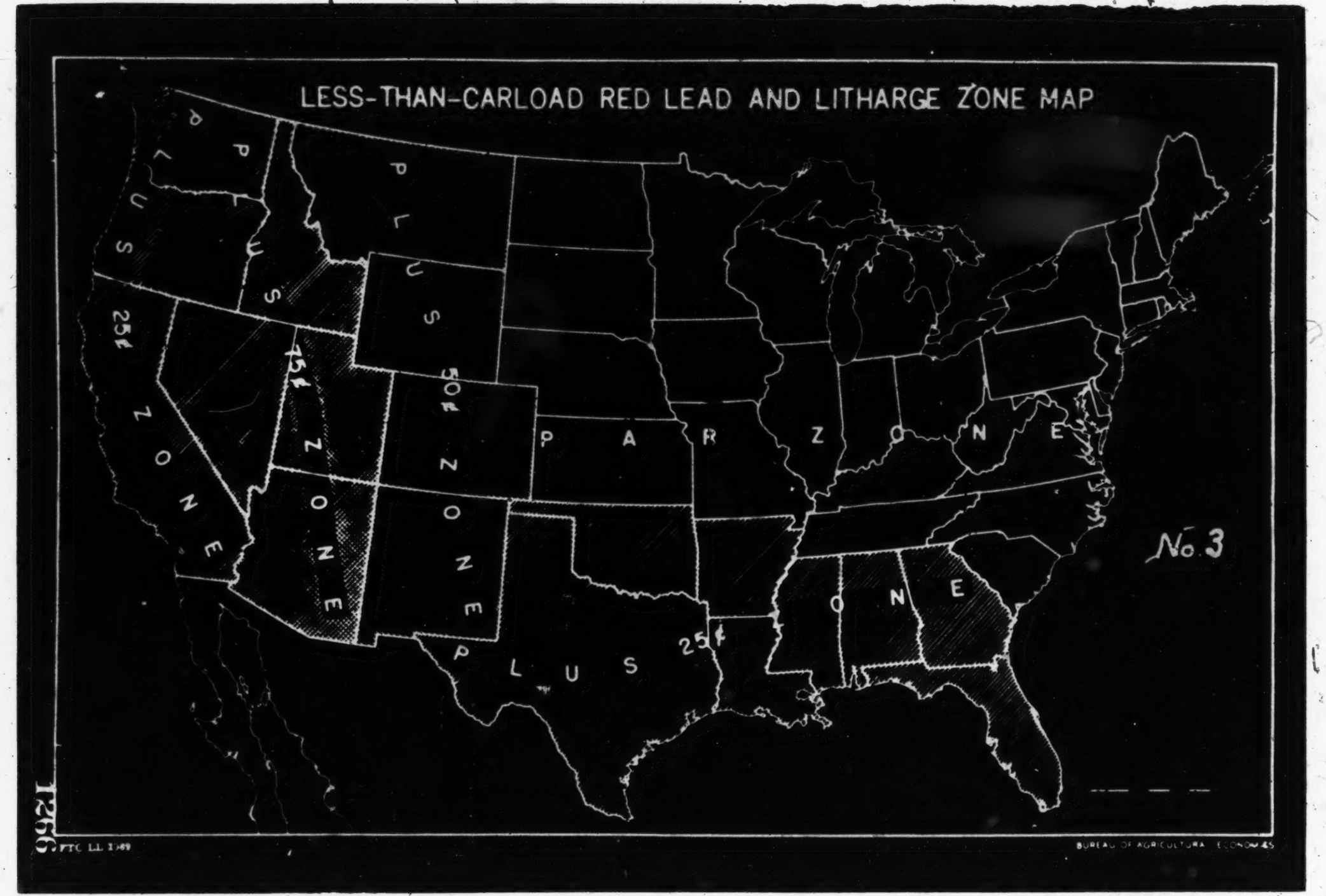
LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP
PLUS 25¢ ZONE
PLUS 75¢ ZONE
PLUS 50¢ ZONE
PLUS 25¢
PAR ZONE
No. 3
BUREAU OF AGRICULTURAL ECONOMICS

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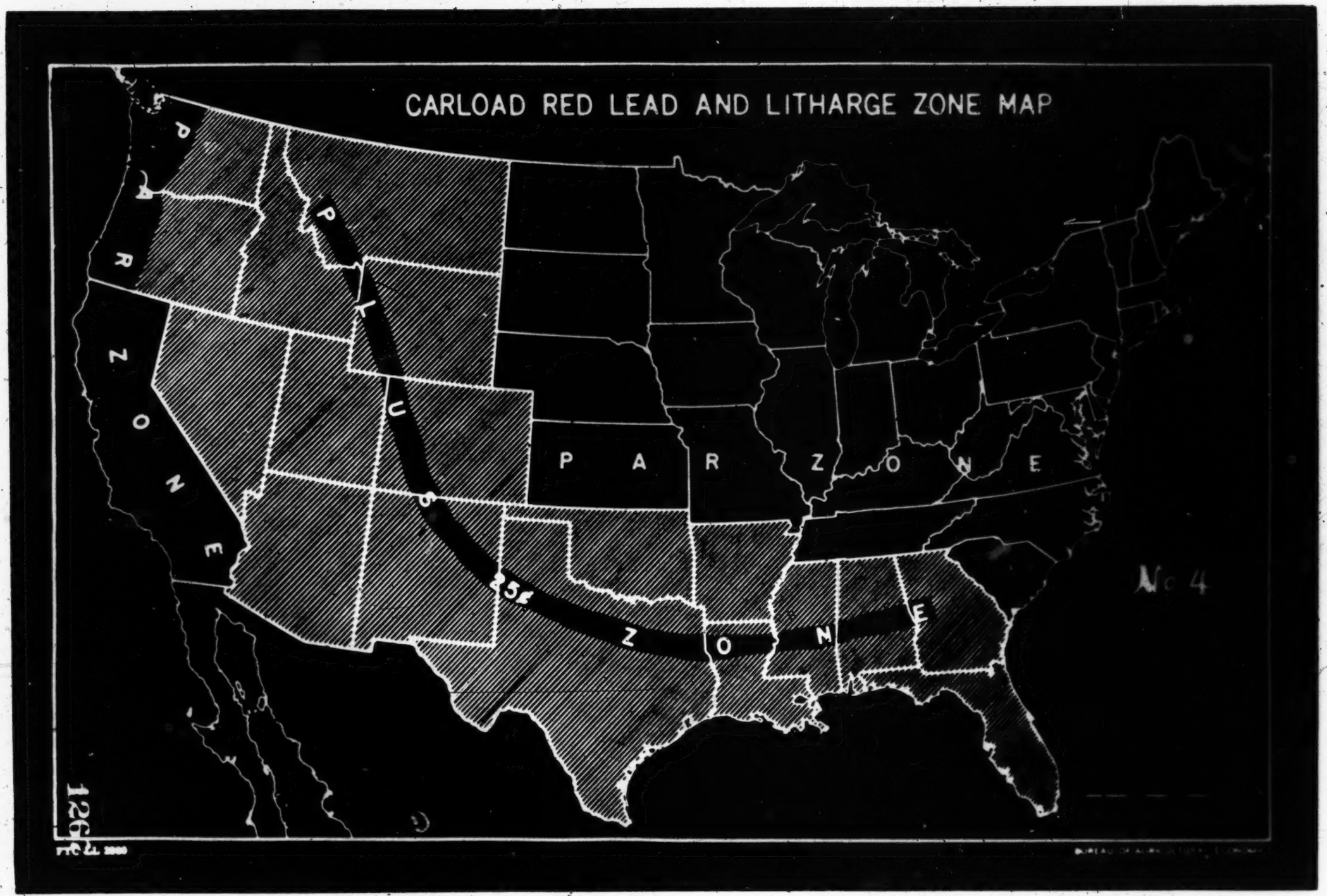
CARLOAD RED LEAD AND LITHARGE ZONE MAP
PACIFIC ZONE
PACIFIC ZONE
PACIFIC ZONE

1268 (5) To sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling resale prices in the trade and preventing competition between themselves and their customers.

(6) To sell lead pigments in kegs and cans at uniform differentials of twenty-five cents per hundred pounds between keg sizes of twelve and one-half, twenty-five, fifty and one hundred pounds.

(7) To allow uniform discounts and terms of sale in transactions involving the sale of dry white lead, with a uniform addition to price quotations for delivery in lots of less than twenty tons.

(8) To quote and sell red lead and litharge in 20-ton quantities on the basis of fixed differentials over the price of pig lead as quoted by the American Smelting and Refining Company.

(9) To quote and sell red lead and litharge in quantities of less than twenty tons on the basis of price cards distributed to the trade and calculated on a fixed differential over pig lead prices.

(10) To fix arbitrary price differences between carload, five-ton and less-than-five-ton purchasers of red lead and litharge in 600-pound barrels, by calculating card prices on the basis of fixed differentials over the American Smelting and Refining Company's price of pig lead.

(11) To refrain from entering into contracts to supply red lead and litharge in quantities of less than twenty tons at a stated differential over the price of pig lead.

(12) To eliminate guarantees against declines in price in sales of red lead and litharge in less-than-carload lots.

1269 Two of the practices covered by these agreements and understandings, namely, the use of the zone delivered pricing system and the agency or consignment method of selling, require further explanation, and these explanations are being set forth in the following Paragraphs Eleven and Twelve. The other practices embodied in the understandings are self-explanatory and are sufficiently described in the recitations hereinafter made concerning their use.

(b) From the foregoing it is apparent that the discussions between the respondents and the agreements for concerted action reached by them in 1933 and 1934 had to do in part with practices which were never covered in any

draft of a supplemental code and which apparently were never intended to be covered in a code, as well as with practices which were covered by provisions of a code but which the respondents never permitted to become operative. Therefore, it is the Commission's conclusion that the discussions engaged in for the ostensible purpose of adopting a supplemental code of fair competition were actually engaged in for the purpose, and certainly they had the effect, of cooperatively revising the pricing practices in the industry in a manner far beyond the sanction of the National Industrial Recovery Act. Nor is the Commission impressed by the respondents' argument that they were being invited by the Government to enter into a price-fixing conspiracy. The evidence discloses that the respondents were well aware of the provisions of the antitrust laws and of their duties and responsibilities thereunder. In the Minutes of the Dry Products Committee meeting of October 27, 1933, for example, there appeared the following notation:

"It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that 'prices were to be agreed upon between buyer and seller.'" (Comm. Ex. 504-B).

It further appears that the respondents were careful to consult their counsel with respect to the adoption of the various practices prior to the approval of the code, and that they were advised that such action "by agreement" might be a violation of law but that one company
1270 might announce a change in practices and the rest of them follow such change "without agreement on the subject but merely because it was individually to their best interests to do so" (Comm. Ex. 522-B). It also further appears that on July 28, 1934, the president of respondent National made a public announcement to the press in which he said, among other things:

"The suspension of the anti-trust laws which was effected by the National Industrial Recovery Act is only temporary, in my opinion. When the anti-trust laws return many companies may again have to learn to operate on an efficient, economical basis." (Resps.' Ex. 168.)

Thus, the Commission is of the opinion, and finds, that the respondents' contention that their price fixing activities were solely in response to Governmental demands and that their meetings were devoted exclusively to efforts to

formulate a supplemental code of fair competition under the National Industrial Recovery Act has no foundation in fact.

Paragraph Eleven: The uniform zone pricing system as devised by the respondents in 1933 and 1934 and thereafter employed by respondents National and Eagle-Picher and followed in salient features by the other respondents involved the sale of lead pigments on a territorial zone delivered price basis, with a flat par price for all deliveries in a par zone, which included several states, and fixed differentials over the par price applicable to the various zones outside of the par zone. The sellers prepaid or allowed deductions for all transportation charges and made no allowances or adjustments for differentials in delivery costs as between various destinations in each of the zones. The record shows that shipments of lead pigments were made by the respondents on this basis from the following, among other, points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri, and Galena, Kansas.

The exact date on which the zone delivered price systems for selling the various lead pigments involved were first put into operation by the respondent is not clearly
1271 shown. It is probable, however, that they were initiated sometime in May or June 1934, for on June 9, 1934, Mr. Harold Rowe, assistant to the president of respondent National, in a letter advising all of National's branch managers of the new zone schedules for oxides and dry white lead, among other things, said:

"We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the states in your territory. It seems important, however, that you should have full information available in your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed." (Resps.' Ex. 159-A.)

Paragraph Twelve: The agency or consignment plan of selling white lead-in-oil was inaugurated by the Atlantic

branch of respondent National Lead Company early in 1932, and in 1933 was extended to National's other eastern territories. The record shows that from the beginning respondent National kept Eagle-Picher fully informed as to its practices and the results that were obtained in connection with the use of this method, and shows further that in November 1933, when National decided to extend the plan on a nation-wide basis, it informed Eagle-Picher of that intention. Eagle-Picher had begun using the plan itself at about the time National had extended its use to all of the eastern territories, and when National extended its use on a nation-wide basis Eagle-Picher did likewise.

Under the consignment plan of selling as employed by respondents National and Eagle-Picher, the sellers appointed dealers as "agents" (in the case of National) and as "distributors" (in the case of Eagle-Picher), and under the terms of the contracts with the dealers stocks were consigned to the "agent" or "distributor" for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks and monthly settlements for the goods sold during the month were
1272 made with the consignor for the total amounts so sold, less the differences between the prices set forth for the consignee and the resale prices charged dealers and consumers. This difference between the consignee's cost and his resale price was his compensation. Expenses of storing, shipping, selling and handling the goods were met by the consignee, who also paid all taxes. The contracts strictly limited the consignee's authority to the custody and sale of such goods as were consigned to him. Consignees could not bind consignors respecting any other than consigned goods or in any other particulars. National's contracts ran between "manufacturer" and "agent". Some of Eagle-Picher's referred to "seller" and "distributor", while others specified the "manufacturer" and "distributor". Consignments were subject to withdrawal at any time, and the consignees were required to report periodically their stocks on hand. The acknowledged purpose of the consignment plan of selling was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stocked in distributors' warehouses, however, and was otherwise objectionable. In writing to du Pont about the plan in September 1933, Mr. Carter, president of respondent National, said in part:

"It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district * * * While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system." (Comm. Ex. 504-D and E.)

And in a circular to branch managers, dated November 9, 1933, Mr. Rowe, of National, said in part:

"It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit." (Comm. Ex. 601-B.)

1273 The record is clear that the agency or consignment plan was effective in preventing sales of white lead-in-oil below cost and other price cutting practices.

Respondent National employed the consignment plan of selling white lead-in-oil from the early part of 1932 to January 1944, when government restrictions caused it to terminate its agency agreements. Respondent Eagle-Picher conformed to National's methods in every essential particular until March 9, 1942, when it modified its contracts to meet war conditions and reduce stocks. Thereafter, Eagle-Picher required consignees to pay at the end of each month for all stock held by them, but it indicated that in other respects the old contracts would be kept in force.

Respondent Anaconda, at first through its subsidiary, Anaconda Lead Products Company, and later through its subsidiary, respondent International Smelting and Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigments business. No particular contract form appears to have been used by these respondents, except in the case of shipments consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee, and this contract was not shown to have been similar to those of National and Eagle-Picher. In other territories their consignment was on a plan of their own, without written contracts and without agreement on the part of the consignee to sell only at retail prices suggested by the consignor.

Respondent Glidden, who had opposed the consignment

plan, did not consign stocks until some six years after the plan was inaugurated. At the insistence of its salesmen and managers it furnished forms and instructions for consignments selling on July 17, 1939. Glidden's contracts and its instructions to salesmen indicate a departure from the plan followed by National and Eagle-Picher in that Glidden offered distributors an exclusive arrangement, whereas the others permitted their consignees to carry consigned stocks of competitors, and
1274 they often did so. Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Glidden's price under the plan, when it was used, was the same as that of other corroders.

Respondent Sherwin-Williams never sold on the agency or consignment plan at any time.

Paragraph Thirteen: With certain exceptions, the respondents have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments agreed upon in 1933 and 1934 as herein found from 1934 to the present time. Illustrative of the manner and extent to which this has been done are the following facts and circumstances:

(a) The record shows that at all times during the period from 1933 to at least 1942 the prices of respondents National and Eagle-Picher on white lead and other keg products of comparable grades sold to comparable classes of dealers were substantially the same, and on such products the prices of respondent Glidden, Sherwin-Williams and Anaconda were customarily twenty-five cents per hundred pounds below the prices of National's "Dutch Boy" and Eagle-Picher's "Eagle" brands of white lead. This difference of twenty-five cents was due primarily to the wide demand which National had created through its prestige, advertising and greater ability to supply the trade with its well known "Dutch Boy" brand of white lead-in-oil, and it was felt by Glidden, Sherwin-Williams and Anaconda (International) that their products could not command the same price. In all cases, however, the dealer's resale or list prices were the same as those of National and Eagle-Picher, and the twenty-five cents concessions were made to the dealer to encourage extra sales effort on his part to sell the lesser known brands. This has been true not only as to sales in the par zone but

also as to sales in all of the other zones. Invoices covering three hundred and four sales of white lead-in-oil during the period from January through March, 1941 by National and Eagle-Picher to agents and distributors in Zones 2, 3, 4, 5, 6 and 7, as shown on the White Lead-in-Oil Map, tabulated in Commission's Exhibits 752-A to Z-16, inclusive, and 754-A to R, inclusive, reveal a strict observance of zone differentials by both of these respondents and identical prices in all but six sales, three of which were over the card price and three under the card price by National. Commission's Exhibits 772-Z-15, 794-D, 1275 I, Y and Z, and 795-M, P and Q discloses thirty-four lead-in-oil sales to dealers in Zones 2 to 6 by respondents Glidden, Anaconda and Sherwin-Williams during the same period, which reveal the strict observance by these respondents of all zone differentials, price uniformity between them in all premium zones into which two or more of them shipped and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zone prices. Sales of dry white lead in carload lots and in quantities less than carloads to manufacturers in the par and twenty-five cent zones during the first quarter of 1941 are shown by four hundred and forty-eight invoices in the record (Comm. Exs. 752-G to Z-120, inclusive; 754-W to Z-9, inclusive; 772-Z; 794-Z; 795-M to Z-7, inclusive). In making these sales the respondents conformed strictly to the zone pricing system, including the zone differentials provided therein, and followed, with few exceptions, a price pattern which involved quantity differentials between carloads and less than carloads sold to manufacturer customers. It is thus clearly established that from and after the early part of 1934 the pricing of lead pigments in accordance with the zone delivered pricing system herein described was the accepted practice among the respondents, and, in fact, the only respondent in this proceeding to seriously deny that it has used such system in the sale of its products is respondent Sherwin-Williams. The contention of this respondent in this respect is separately treated hereinafter.

(b) The respondents' price cards issued periodically during the period covered by this proceeding carried not only the prices at which products would be sold to dealers and others, but also complete lists of prices at which it was suggested that the dealers and others sell white lead-in-oil

and other keg products to consumers and painters. The terms used on these cards for such suggested resale prices were "Dealers' Schedule", "Resale Prices", "Painters' Price List" and "Dealers' Recommended Selling Schedule", and the prices set forth under these designations by all of the respondents at comparable times were substantially identical. The following table contains the card resale prices of the respondents for white lead-in-oil as of the dates shown, which were the effective dates for each of the cards:

Resp.	In 100 lb. kegs	In 50 lb. kegs	In 25 lb. kegs	In 12½ lb. kegs	Date	Comm. Exhibit
National	13.00	13.25	13.50	13.75	9/13/37	659-Z1
Eagle-Picher	13.00	13.25	13.50	13.75	9/14/37	660-A
Anaconda	13.00	13.25	13.50	13.75	9/15/37	661-Z3
*Glidden						
Sherwin-Williams	13.00	13.25	13.50	13.75	9/15/37	662-Z9
National	11.75	12.00	12.25	12.50	1/10/38	659-Z15
**Eagle-Picher	11.75	12.00	12.28	12.56	1/11/38	660-C
**Anaconda	11.75	12.00	12.28	12.56	1/10/38	661-Z1
Glidden	11.75	12.00	12.25	12.50	1/11/38	663-F
Sherwin-Williams	11.75	12.00	12.25	12.50	1/11/38	662-Z13
National	12.25	12.50	12.75	13.00	2/27/39	659-Z31
**Eagle-Picher	12.25	12.50	12.76	13.04	3/ 1/39	660-F
Anaconda	12.25	12.50	12.75	13.00	3/ 3/39	661-X
Glidden	12.25	12.50	12.75	13.00	2/27/39	663-I
Sherwin-Williams	12.25	12.50	12.75	13.00	2/23/39	662-Z19
National	13.25	13.50	13.75	14.00	4/26/41	659-Z41
Eagle-Picher	13.25	13.50	13.75	14.00	5/ 1/41	660-H
**Anaconda	13.25	13.50	13.76	14.00	5/ 3/41	661-V
Glidden	13.25	13.50	13.75	14.00	4/26/41	663-K
Sherwin-Williams	13.25	13.50	13.75	14.00	4/25/41	662-Z23

On all cards the suggested prices to painters were $1.00 less than each quotation given above.

* The price cards of respondent Glidden for this period was not furnished. This respondent's price cards for other dates, however, show that its resale prices were identical with those of the other respondents for the comparable dates.

** The apparent differences in the quotations of respondents Eagle-Picher and Anaconda for the 25-pound and 12½-pound kegs during January 1938, March 1939 and May 1941 may be explained, at least in part, by the fact that Eagle-Picher and Anaconda quoted on these smaller packages a price per unit of 25 or 12½ pounds, rather than a price based on 100 pounds, as did the other respondents. Since there is a fraction of a cent involved in dividing the hundredweight price by 4 or 8 to determine the 25- or 12½-pound container price, Eagle-Picher and Anaconda evidently used the even cent next above the fraction in quoting on such single containers for the periods mentioned. This does not necessarily represent a real price difference between Eagle-Picher and Anaconda on the one hand and the other respondents on the other, for it is entirely possible that any of the other respondents in quoting on a single unit would also use the cent above the fraction.

(c) The differentials over American Smelting and Refining Company's price on pig lead of $1.50 per hundredweight for litharge and $2.50 per hundredweight for red lead in carload quantities had been employed in the industry for some time prior to 1933, and each of the respondents, except Anaconda (International), who sold no oxides, used them uniformly thereafter (Tr. 1292, 1326-1328, 1618-1620, 2666, 2692-2697; Comm. Exs. 137-A, 762-B). Actual sales of red lead and litharge as evidenced by a large number of invoices in the record of respondent's National, Eagle-Picher and Glidden for the last quarter of 1941 follow in regular patterns the formula of $1.50 for litharge and $2.50 for red lead over A. S. & R.'s pig lead quotations, and with occasional exceptions covered by contract sales and some sales to large battery manufacturers, the prices of the three were uniform. Prices of oxides in quantities smaller than carloads have been based on the aforesaid carload prices as determined by these differentials (Tr. 1618-1621, 2390-7). It is also shown that the quantity differentials stated in Schedule A attached to the supplemental code between twenty tons and less on lead carbonates and between five tons and less on lead oxides were allowed on the price cards of all respondents quoting on these products after 1933 (Comm. Exs. 659-663, inclusive, 615-B). In addition, it appears 1278 that all of the other conditions provided in Schedule A for the sale of oxides, except the stated terms of sale and f. o. b. car deliveries at seller's plant, were consistently observed and practiced by all of the respondents during and after the code period. The dealers' price cards in the record indicate that the terms of sale used by the respondents have varied from 1% ten days, net thirty days to 2% ten days, net sixty days, but that at any one period the terms of all of the respondents on similar products and quantities have been uniform, and deliveries, for the most part, have been to the buyer's location, to the seller's plant with freight allowed, or f. o. b. stated shipping or equalization points.

(d) As shown in Paragraph Eight (a) hereof, container price differentials were discussed in detail at the meeting of the Dry Products Committee of the Lead Pigments Division of the association on August 8, 1933, and the following provision was tentatively adopted, but was not thereafter incorporated into the code:

"On Government bids and on railroads (and industrial) business the following package differentials over l.c.l. barrel prices are hereby established:

100 lb. kegs	$ .50
50 lb. kegs	$ .75
25 lb. kegs	1.00" (Comm. Ex. 800-C)

Both the testimony and the numerous price cards in the record show that thereafter all of the respondents quoted and charged a differential of twenty-five cents as between various container sizes used to contain one hundred pounds of pigments, that is, one hundred pounds of pigments in two 50-pound kegs or cans were sold at twenty-five cents more than the price for the same quantity in one container. For four 25-pound containers, fifty cents was added, and for eight 12½-pound containers, seventy-five cents was added. This practice was employed by all of the respondents without deviation, and both National
1279 Lead Company and The Sherwin-Williams Company introduced evidence purporting to show that the differentials so charged were less than the costs involved as between single containers requiring only one process of sealing, packing, labeling and handling and the additional containers, each of which has to be similarly processed.

(e) With respect to quarterly contracts for the sale of lead pigments, there was in the supplemental code for the lead pigments industry a provision for contract sales of dry white lead, basic carbonate, with specific provisions for the basing of prices on the seller's card price on the first day of each quarter (Comm. Ex. 809, Schedule A, Article III). There was also in the code a provision for basing carload prices of oxides on A. S. & R.'s market prices on the dates orders were received. The matter of uniform sales contracts and conditions to carry these provisions into effect was discussed in committee meetings prior to the adoption of the code, and some of the provisions were incorporated into the second draft (Comm. Exs. 800-C; 801-A; 802-A), but these were not adopted into the final draft of the code, and it was not shown that a uniform contract was ever finally agreed upon or used generally. The respondents, except respondent Anaconda (International), did continue to make quarterly contracts for sale of lead pigments, however, and the agreed upon formula for differentials over pig lead prices was applied by all of them to

carload prices on oxides. On less than carloads of oxides, the card prices based on the carload prices were uniformly used.

(f) The supplemental code for the lead pigments industry, in Article I of Schedule A thereof, also contained a provision under which 97% or 98% red lead (Pb_3O_4) should be sold at not less than one-quarter cent and one-half cent per pound, respectively, over the seller's price for grades of lower Pb_3O_4 content. Both during and subsequent to the code period all of the respondents, except Anaconda (International) which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed upon and so included in the code. For 97% Pb_3O_4, a charge of one-quarter cent per pound over lower grades was added and for 98% the charge was one-quarter
1280 cent over the price of the 97% grade. The fact that these differentials were uniformly applied was not denied, but the respondents did contend that the increased costs of manufacturing 97% and 98% red lead as compared with the costs of manufacturing 95% red lead fully justified the increased prices for those products. In this connection the record shows that the higher grades of red lead are made by extra burning and that their production does involve a difference in the cost of manufacture, and this phase of the subject is more particularly referred to hereinafter.

(g) Means of eliminating low bids on government and state purchases had been discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business among the respondents and the method by which it might be accomplished were considered, and the group was asked to give the matter additional thought (Comm. Ex. 501-C). The record does not disclose any further joint discussion of this subject, but it does contain tabulations of a number of bids to purchasers in this category subsequent to 1933. It is shown, for example, that from 1935 to 1941, sixteen separate bids were submitted to the City of Cincinnati for the sale of basic carbonate of white lead by respondents National, Eagle-Picher and Sherwin-Williams. Eleven of these bids were identical to the fourth decimal (Comm. Ex. 864; Tr. 4095). Identical bids on white lead-in-oil were also submitted to the City of Milwaukee Board of Purchases as follows: In 1939, by National and Sherwin-

Williams, both bidding $8.33 per hundred; in 1940, by Eagle-Picher, National and Sherwin-Williams, all bidding $8.57; in 1942, by Eagle-Picher and Sherwin-Williams, both bidding $9.80 (while National bid $10.05); and in 1943, by Eagle-Picher, National and Sherwin-Williams, all bidding $9.80 (Comm. Ex. 865-A to E, inclusive; Tr. 4096). The record further shows that in bids submitted during 1939, 1940 and 1941 to the United States Navy, the United States Treasury and the Panama Canal Zone there were twelve cases of unequal bids by the respondents, with only nine cases of identical prices by two or more of them, all respondents being involved in these bids (Resps.' Exs. 306-A and B, 307-A and B and 308-A, B and C; Tr. 4096), but in view of the background of the respondents' dis-
1281 cussions where they sought to reach an understanding on a method of allocating government business between themselves by prearrangement and collusive bids, this evidence as to the dissimilar bids to the three government departments is not persuasive to show substantial competition among them. Price differences as to one particular type of customer does not detract from the illegality of the conspiracy found in the face of rigid adherence to the agreed system as to all other types of customers, including government agencies.

Paragraph Fourteen: The adherence by each of the respondents individually to the trade practices and pricing methods agreed upon by them in 1933 and 1934 is clearly demonstrated in the record.

(a) Commission's Exhibit 752-A to Z-144 is a tabulation of invoices compiled directly from the records of respondent National Lead Company, showing sales of lead pigments by that company in about sixty different cities during two quarters of 1941 and one quarter of 1943. The prices and the trade classifications shown on this tabulation covering thousands of transactions clearly demonstrates an inflexible use of the zone delivered pricing system by National Lead Company in strict conformity with that agreed upon. This company's practices in selling in accordance with its published prices were described by the manager of the Trade Sales Department, Mr. McCarthy, as follows:

"Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead

Company over the period of your experience with the company?"

"A. Definitely." (Tr. 4099)

The manager of National's Dry Products Department was called as a witness and testified that the company had generally followed, at least from 1938 when he assumed his present position, the terms and conditions of sale set forth in Schedule A of the supplemental code, and that National has generally employed the differentials of $1.50 for litharge and $2.50 for red lead over American Smelting and Refining Company's quotations on spot sales,
1282 or American Smelting and Refining Company's, American Metal Market's or Engineering and Mining Journal's average price quotations of pig lead. The prices, terms and conditions of sale generally employed by National during the period from 1934 to date of the hearings in this proceeding in the form of price cards, price announcements and instructions to branch managers as to pricing, showing adherence to the system, appear in the record as Commission's Exhibits 595, 659, 806 and 862 and Respondents' Exhibits 154, 158 and 167.

Insofar as respondent National is concerned, the only important deviations from the trade practices and pricing methods agreed upon by the respondents have been in some sales to very large battery manufacturers and in the bids to the three government departments referred to in Paragraph Thirteen (g) hereof. In the period of the last quarter of 1941, National did make concessions from the regular differentials on carload purchases of battery oxides by the large battery manufacturers. The record shows, however, that one of the problems of the industry was to overcome the possibility of large battery manufacturers producing their own oxides, and it may be assumed that National's concessions to these purchasers have been the result of pressure on it by the large consumers of these products who might have been in a position to produce their own red lead and litharge if the concessions were not allowed.

(b) With but a single exception, respondent Eagle-Picher followed the pricing practices and policies of National Lead Company in all aspects from and after 1934. The exception was that in some instances Eagle-Picher did not follow National in granting quantity allowances on white lead-in-oil sales direct to painters, which, how-

ever, was a very minor part of Eagle-Picher's business in white lead-in-oil. Like National, Eagle-Picher apparently found it necessary to depart on occasions from the regular carload differentials in selling battery oxides to very large battery manufacturers who were in a position to produce their own oxides. The manager of Eagle-Picher's White Lead Division testified unequivocally that Eagle-Picher had used the zones since 1933 or 1934 substantially as they are shown on the maps included herein. The same official also testified as follows:

1283 "Q. Well, then, if these prices of white lead-in-oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can you tell me of any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices, leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?"

"A. Not in that period you mentioned, I don't think there were any exceptions or occasions where they didn't follow it." (Tr. 3686 and 3687)

Another official of Eagle-Picher (manager of the Pigment Division and a director of the company) while testifying regarding the sale of dry products stated that the carload differentials, card prices and zones, as well as most of the terms and conditions of sale as set forth in Schedule A attached to the supplemental code have been followed by Eagle-Picher in the period subsequent to the code's adoption (Tr. 1590-1621). When asked about adopting the two-zone system for selling their dry white lead, this witness testified as follows:

"Q. Why did these companies adopt this two-zone system for selling dry white lead?"

"A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis."

The price cards, announcements to the trade, instructions to salesmen and branch officials and invoice records of respondent Eagle-Picher for the years subsequent to 1934 likewise clearly show adherence by this company to the agreed pricing methods and terms and conditions of sale (Comm. Exs. 585-590, 658, 660, 754, 838 and 840).

(c). The extent of the adherence of respondent Anaconda (International Smelting and Refining Company and the other subsidiaries of Anaconda Copper Mining

1284 Company) to the zone methods and pricing policies agreed upon in connection with sales of white lead-in-oil and dry white lead, the only two pigments produced by them, is best demonstrated by the testimony of one of the officials of respondent International. This witness testified in part as follows:

"Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than sold by your competitors?

"A. No." (Tr. 3505)

The same witness later testified:

"Our prices were based on what our competitors were doing." (Tr. 3585)

When asked about the adoption of the zone system for the sale of dry white lead, the witness responded as follows:

"Q. Why did these companies adopt this two-zone system for selling dry white lead?"

"A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis." (Tr. 3498)

The only deviation by these respondents from the agreed upon practices was in connection with sales of white lead-in-oil. The Anaconda brand of white lead-in-oil was relatively a newcomer into the industry, and difficulty was encountered in establishing it with dealers against the better known "Dutch Boy" brand of National and the "Eagle" brand of Eagle-Picher. Thus, while the same resale prices to consumers and painters were set by the Anaconda subsidiaries as were set by National and Eagle-Picher, their dealer price on white lead-in-oil was twenty-five cents per hundred pounds lower, for the purpose of giving the dealer an extra compensation of twenty-five cents per hundred pounds for handling the lesser known brand. The 1285 evidence in the form of price cards, price announcements, zone maps and stipulated facts shows that with the single exception noted the subsidiaries of respondent Anaconda Copper Mining Company acting for and on behalf of said respondent followed the practices adopted in 1933 and 1934 from the code period to 1946, when they ceased the manufacture and sale of lead pigments (Comm. Exs. 591, 592, 661, 738, 739, 795 and 836).

(d) The invoices, price cards, instructions to salesmen and other documents in the record, including tabulations of sales records (Comm. Exs. 757-767, inclusive, 771, 772,

798, 810, 829, 830, 831 and 841), show that respondent Glidden likewise adopted and followed the agreed pricing practices and terms and conditions of sale, with minor deviations, from the period of the code to the date of the hearings in this proceeding. The one major exception was that for a period of time respondent Glidden offered dealers purchasing white lead-in-oil outright a price twenty cents lower than the prices obtained by respondents National and Eagle-Picher for their brands of white lead-in-oil. Since resale prices to consumers and painters were identical with those of the other respondents, this concession, as was true with similar concessions by Anaconda and Sherwin-Williams, serve primarily as an added incentive to the dealer to promote the sale of Glidden's products without disturbing the fixed resale price level. An indication of the extent to which Glidden followed the actions of its competitors is the statement of its vice president, Paul E. Sprague, a principal participant in the pigments division meetings in 1933, that it was never to Glidden's interest to initiate a change in the price of lead pigments (Tr. 2561).—Mr. Sprague stated all through his testimony that it had been Glidden's practice from the code period onward to follow the prices of National. One exception was that in the period before 1936 Glidden allowed a differential of one-eigh •cent per pound on dry white lead sales to paint manufacturers to overcome the reluctance of the manufacturers to purchase from a competitor.
1286 The existence of a well understood policy on the part of Glidden to follow National and the other respondents in these matters is illustrated by Commission's Exhibit 774, which is a letter from the manager of Glidden's San Francisco branch under date of July 6, 1945, transmitting price information to the central office of Glidden and which contains the following note:

"Due to the fact that we have been unable to find any price list for the first and last quarters of 1941, Mr. Ehrke suggested that you may want the National Lead price list for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours."

As noted elsewhere, respondent Glidden did not participate in the agreement to adopt the consignment plan of selling white lead-in-oil in 1933, and when it did use agency contracts in the period from 1939 to 1941 it apparently did so with some reluctance.

(e) It is the contention of respondent Sherwin-Williams

that it does not at any time employ the zone system in quoting and selling its lead pigments and that its present method is one of free delivery and equalization points as previously utilized in the industry as a whole. It appears from the testimony of witnesses and from the price cards and announcements of the company, however, that Sherwin-Williams' deviations from the zone pricing methods since 1934 have been the exception rather than the rule. In selling to all of its company-owned stores, Sherwin-Williams has consistently used the zones and the differentials set forth in the maps included herein, and in selling to customers, wherever located, who purchase in truckload quantities, and to all other customers who could purchase from a competitive seller on the zone basis, its sales and differentials have been on the same basis. Moreover, a "truck load" under Sherwin-Williams' practice includes quantities as little as ten thousand pounds and may include paint or any other item sold by Sherwin-Williams.

1287 An examination of Sherwin-Williams' white lead-in-oil price sheets in the record discloses on the face of each a list of shipping points (Comm. Ex. 662-Y to Z-25, inc.), which lists without more, would indicate offers to sell at the listed points, with the customers paying the freight from such points to their locations. It is evident, however, that the so-called shipping points on the Sherwin-Williams price lists were not in fact f. o. b. points from which freight was added in any but a small number of instances. The General Trade Sales Bulletins from the headquarters of the Sherwin-Williams Company to the branches and sales personnel frequently referred to the zones. For instance, Commission's Exhibit 662-F, General Trade Sales Department Bulletin No. 24, under date of December 28, 1936, contained the following statement:

> "Zone Differentials
>
> On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert."

Other subsequent Trade Sales Department Bulletins contained similar instructions and above them the descriptions:

"Consumers Prices—Eastern Zone"

"S-W Dealers—Eastern Zone" (Comm. Ex. 662-I to V, inc.)

The adherence of Sherwin-Williams to the zone pricing system in at least a part of the country is illustrated by Commission's Exhibit 782-D, which is a price bulletin issued by the San Francisco office of Sherwin-Williams showing the application of the zone system as such to all of the business of Sherwin-Williams on the Pacific Coast. Commission's Exhibit 823-A to G, inclusive, shows that while Sherwin-Williams apparently did charge freight on less-than-carload shipments of red lead and litharge from warehouses during 1932 and 1933, beginning in 1934 when the zone system was adopted delivered price quotations on these products were made in accordance with the zone plan adopted by the industry, which practice continued down to 1942.

1288 After it had been testified by a vice president of Sherwin-Williams that the company invariably added freight charges to sales of white lead-in-oil away from the shipping points appearing on its price-cards, numerous invoices were produced (tabulated in Comm. Ex. 662-A to Z-26, inclusive) showing that in a large number of instances Sherwin-Williams did not require customers in towns away from its shipping points to pay additional transportation charges. Following this evidence, officials of Sherwin-Williams were called who modified the original statement of policy and testified that the company added freight charges to customers located away from the shipping points, except when such customers purchased in carload or truck load quantities and except when competitors' use of the zone method required the company to absorb or prepay freight charges in order to meet the local competitive situation (Tr. 3694, 3743 and 4103). The evidence shows that as a matter of fact these two exceptions from the policy embraced a majority of Sherwin-Williams' sales and that in most of its transactions Sherwin-Williams did sell in accordance with the zone system and did absorb the transportation charges. Except that Sherwin-Williams quoted a dealer price twenty-five cents per hundred pounds lower on white lead-in-oil than that quoted by respondents National and Eagle-Picher (in the same manner as did respondents Glidden and International), its use of the zone pricing methods and other practices agreed upon in 1933 and 1934 has been in conformance with the similar actions of the other respondents.

Paragraph Fifteen: The combined results of the use by the respondents of the practices herein described have

been to produce substantially identical prices, terms and conditions of sale as between respondents National and Eagle-Picher and to produce substantial uniformity of price differentials, terms and conditions of sale among respondents Anaconda, Glidden and Sherwin-Williams and prices by these three which varied from those of National and Eagle-Picher according to pattern and according to differences of brand and quality of products. The zone pricing feature was shown to be a method which facilitated
1289 the meeting, or matching, of competitors' prices. The agency or consignment method of selling was shown by conclusive evidence to have had the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits for dealers. The various differentials have operated to establish an inflexible price structure which has eliminated variations in the prices of lead pigments based on quantity, quality, cost of delivery, container costs and other price factors which an unrestrained market system would provide for the purposes of bargain and sale. The pricing system which has been maintained in the sale of oxides is such that all delivered prices on the various grades, quantities and qualities of these products advance or recede with the change of one price factor; and the continuous rigidity and uniformity in prices, terms and conditions of sale of white lead and other keg products not only illustrates the effectiveness of the respondents' methods in connection with the sale of these products, but also reveals the purposes underlying their employment.

Officials of each of the respondents vigorously assert that there were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. The evidence does disclose understandings and cooperative activities, however, which, when considered in the light of the circumstances, leads the Commission to the conclusion, and it accordingly finds, that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of the respondents to follow it.

Such mutual understanding constituted a conspiracy on the part of all of the respondents to fix and maintain prices, differentials, terms and conditions of sale in the lead pigments industry, which conspiracy was carried out by
1290 all of the respondents through the various methods herein set forth. While some of the respondents did not employ all of the particular methods, and while there were some variations in practices and results as between respondents, it is clear that each of the respondents has gone far beyond the requirements of competition, and beyond the necessities imposed by National's price leadership, in the practice of the various methods they discussed together and in the maintenance of uniformity of prices, terms and conditions of sale, all of which could not have resulted from other than agreement and conspiracy.

The respondents further contend that the practices found to have been employed by them are not subject to corrective action by the Commission by reason of the provision of Section 5 of the National Industrial Recovery Act (48 Stat. 198), reading as follows:

"While this title is in effect (or in the case of a license, while section 4 is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States."

The Commission is of the opinion, however, that there is no merit in this contention. As hereinabove found, the provisions of the supplemental code for the lead pigments industry covering some of the practices involved were suspended by an exemption by the N.R.A. officials issued upon application of the respondents. This was extended at their request so that these code provisions were never effective. In the opinion of the Commission, this precludes the application of the exemptions provided for in Section 5 of the Act to the practices engaged in pursuant to these provisions. Other practices involved in this proceeding were never adopted and incorporated into the code, and obviously were not protected by Section 5 of the Act either during or after the code period. Moreover, the practices covered by the provisions which were adopted and
1291 suspended, as well as the other practices, were employed both before and for more than sixty days after the termination of the code and the expiration of the ex-

emption period provided in Section 5. Such practices, having been initiated and continued as the result of a price-fixing conspiracy not entitled to any protection provided by the National Industrial Recovery Act or any other statute, are illegal per se and are not immune from the Commission's corrective action.

Paragraph Sixteen: In addition to charging the respondents with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, the amended complaint in this proceeding, in Count II thereof, alleges, among other things, that when sales are made to customers located at or near the borders of adjoining or contiguous zones pursuant to the zone delivered pricing method herein described, each of the respondents charges, demands, accepts and receives from some purchasers of its lead pigments higher prices for such products than it receives from other and competing purchasers in different zones, and that as a result of said practice each of the respondents discriminates in the delivered costs of its lead pigments to different purchasers, all in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Said Count II also alleges that each of the respondents further discriminates in the price of its lead pigments as between competing purchasers of said products by classifying its customers to receive quantity, trade and regional discounts from quoted prices, so that by virtue of such classifications and actions pursuant thereto each of the respondents charges, demands, accepts and receives in connection with sales of its lead pigments in commerce higher prices from some of its customers than from other competing customers. Upon its consideration of the record the Commission makes the following additional findings with respect to the issues raised by these particular allegations.

1292 Paragraph Seventeen: (a) As hereinabove found, each of the respondents (except respondents Anaconda and International) since 1934 has sold its dry red lead and litharge in barrels or bags in less-than-carload lots at the same delivered costs to all customers in a so-called par zone consisting of all the States of the United States other than those specifically named below. In the States of Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and those portions of Oregon and Washington lying west of the Cas-

cade mountains, a differential of twenty-five cents per hundredweight was added for deliveries to all customers at all points. In the case of sales to customers in the States of Colorado, Montana, New Mexico and Wyoming, a differential of fifty cents per hundredweight was added to the par zone price. For deliveries in Arizona, Idaho, Nevada, Utah and those portions of Oregon and Washington lying east of the Cascade mountains, a differential of seventy-five cents over the par zone price was added. Since 1934, each of the respondents has also sold its dry red lead and litharge in barrels or bags in carload lots of twenty tons or more at a differential of $2.50 per hundredweight for red lead and $1.50 per hundredweight for litharge over American Smelting and Refining Company's closing price for common pig lead at New York on the date the order was received, and has delivered these products to customers in the par or base zone at the aforesaid delivered prices. For deliveries to customers in the States of Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and those portions of Oregon and Washington lying east of the Cascade mountains, a premium of twenty-five cents per hundredweight has been added to the par zone prices. The record shows that shipments of dry red lead and litharge have been made by one or another of the respondents at the aforesaid prices and with the stated differentials added from the following, among other, points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; and Galena, Kansas (Tr. 1314, 1564 and Comm. Ex. 756-A).

1293 Large quantities of red lead and litharge so sold by the respondents are sold to the manufacturers of storage batteries. The storage battery industry consists of more than two hundred companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose production of batteries may be less than fifty units per day. During the period from 1934 to 1941, one of the oxide customers of respondent National was Vitalic Battery Company, Inc., of Dallas, Texas, in the twenty-five cent premium zone, which purchased on the carload basis with deliveries being

made by National out of the Dallas plant. It was stipulated between counsel that if an official of Vitalic Battery Company were called as a witness he would testify that red lead and litharge have been purchased by Vitalic from respondents National and Eagle-Picher at the published carload prices for delivery in Dallas; that the company markets storage batteries in Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana and New Mexico; that the cost of lead oxides amounts to approximately 33% of the total material costs involved in the production of storage batteries; and that the following concerns are Vitalic's chief competitors: Willard Storage Battery Company, Exide Storage Battery Company, National Battery Company and others. These large competitors of Vitalic are all located in the par zone where the delivered price of battery oxides is $1.50 per barrel less than in Dallas.

During the same period of time, 1934 to 1941, respondent Eagle-Picher shipped lead oxides to battery manufacturers from its borderline plant in Joplin, Missouri, to near and far points in different zones. For oxides, this plant is in the par zone and about ten miles from the borderline of Oklahoma, which is in the twenty-five cent premium zone. In the last quarter of 1941 particularly, Eagle-Picher was quoting and selling red lead and litharge at points on the Pacific Coast taking par zone price, while it was quoting and selling to customers in Oklahoma and Arkansas, no more than fifteen miles away from its plant, at a differential of twenty-five cents per hundredweight over the par zone price. At the same time, respond-
1294 ents Glidden and Sherwin-Williams were selling red lead and litharge on the same zone delivered price basis (except that Sherwin-Williams did not sell to battery manufacturers).

(b) Since 1934, the respondents National Lead Company, The Eagle-Picher Company, The Glidden Company and The Sherwin-Williams Company have consistently quoted and charged different prices as between carload purchasers and less-than-carload purchasers of their oxides. As hereinabove found, the carload price was based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities involved a difference of forty cents per hundredweight as between carload and five tons and ninety cents per hundredweight as between carloads and quantities less than five tons. These price differences in a substantial number of

cases were much more than the differences between car and less-than-car freight rates and resulted in an excess charge over delivery costs as high as eighty-eight cents per hundredweight against the purchasers of small quantities. The following prices and rates per hundredweight tabulated from Commission's Exhibits 852-A, B, F and O and 854-C show representative results of these differences and include shipments by respondents National, Eagle-Picher and Glidden:

Origin	Destination	Unit	Price Difference ¢	Freight Difference ¢	Lack of Justification on Basis of Freight Rates ¢
St. Louis	Birmingham	CL	0		
"	"	5-ton	40	35	5
Dallas	San Antonio	CL	0		
"	"	L 5-ton	90	50	40
San Francisco	San Francisco	CL	0	0	
"	"	5-ton	40	0	40
Hammond	Chicago	CL	0		
"	"	5-ton	40	4	36
"	"	L 5-ton	90	4	86
Detroit	Detroit	CL	0		
"	"	L 5-ton	90	2	88
Cleveland	Akron	5-ton	0		
"	"	L 5-ton	50	3	47
Chicago	Chicago	CL	0		
"	"	5-ton	40	2	38

1295 All of the shipments included in this tabulation were of red lead. Rates and differentials on litharge were the same, and the prices were $1.00 less per one hundred pounds in all billings. The freight rates on 5-ton and smaller lots were the same. Thus, the lack of justification on shipments under five tons can be determined by adding fifty cents to the 5-ton differential, revealing a price difference of fifty cents or more over freight differences at all points, and no case where the differential between 5-ton and smaller shipments was justified on the basis of freight rates. Respondents' own estimates shown for dry white lead indicate an increased cost of about one-fourth cent per pound against less-than-car lots, but this figure applied to oxides would fall far short of justifying the ninety cents differential in any case or the forty cents charge in most cases. An additional differential of twenty-five cents per hundredweight on less-than-car shipments of oxides was made in the case of shipments to customers in Montana, Wyoming, Colorado

and New Mexico, since these States are in the fifty cent zone for small shipments and in the twenty-five cent zone for car lots (Comm. Ex. 854-B, C).

The evidence in the record is that during the period from 1934 to 1941 the storage battery business was characterized by sharp price competition, particularly on the part of some of the large battery manufacturers, such as Globe-Union, Inc., a subsidiary of Sears-Roebuck and Company, National Battery Company and Bowers Battery Company. Illustrative of the competitive importance during this period of the price difference of nearly $6.00 per barrel allowed by the respondents in favor of the manufacturer who purchased his oxides in carload quantities as against the manufacturer who purchased in smaller lots was the following situation. In 1941, National sold to two small battery manufacturers located in St. Louis, Missouri, delivering by its own truck out of its St. Louis plant at the less-than-5-ton price, which was $5.40 per barrel higher than the carload price, and to two small battery manufacturers at the 5-ton price, which was $2.40 per barrel higher than the carload price (Comm. Ex. 853-F), and at the same time sold on the carload basis to larger manufacturers of batteries in Omaha, Nebraska, 1296 where the carload freight rate was $1.74 per barrel, Indianapolis, Indiana, where the rate was $1.32 per barrel, Muncie, Indiana, where the rate was $1.44 per barrel, and Niagara Falls, New York, where the rate was $2.36 per barrel (Comm. Ex. 853-F and G). Deliveries to the carload customers involved in the sales in Omaha, Indianapolis, Muncie and Niagara Falls were all made out of the St. Louis branch and the purchasers were Grant Storage Battery Company, Prest-o-lite Company, Inc., one of the largest manufacturers of batteries, and Delco-Remy Division of General Motors Corporation. The four less-than-carload accounts in St. Louis were manufacturers who produced batteries on a small scale with very limited distribution (Tr. 1919, 1920 and 1924). The proprietor of one of these customers, Sidney Battery Manufacturing Company, a purchaser in 5-ton quantities, was called as a witness and testified that he had been a customer of National Lead Company, receiving deliveries out of the St. Louis plant for approximately twelve to fifteen years, purchasing on either the 5-ton or the less-than-5-ton basis, and engaged in producing up to one hundred and thirty-five storage batteries per day, the capacity of its plant. This

witness testified that during the period from 1936 to 1941, competitive conditions in the sale of storage batteries in the St. Louis area "were so bad that the only way we could get by and make a living was to use the old battery cases over again"; that the competition of Grant Storage Battery Company, Majestic and Monarch, of Chicago, and Sears-Roebuck and Company was such that the enterprise had gone "broke" in about 1933; and that in the following period his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck (Tr. 1926-28). Commission's Exhibit 853-A shows that during the same period of time, respondent National sold battery oxides to Globe-Union, Inc., the battery manufacturing subsidiary of Sears-Roebuck and Company, on the carload basis, shipping from St. Louis to Memphis, Tennessee, at a rail freight rate of $1.98 per barrel, and from St. Louis to Milwaukee, Wisconsin, at a rate of ninety-six cents per barrel.

1297 (c) The price differentials between zones observed by the respondents in the sale of their oxides, as described in subparagraph (a), and the added amounts charged on shipments originating and terminating in the same premium zone over those originating and terminating in the par zone, was shown to increase the cost of oxides to the non-par zone purchaser from one-quarter cent to one-half cent per pound. To this difference was added, in the case of less-than-carload purchasers, the differential charged such purchasers over the carload price. Thus, in the case of small battery manufacturers in Birmingham, Alabama, who purchased in less-than-5-ton quantities, some of whom were shown to be in competition with chain and mail order battery manufacturers located in the par zone, the added quantity differential was fifty-five cents per hundredweight (ninety cents less a rate difference of thirty-five cents). The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were ninety cents quantity differential, plus a twenty-five cents difference between carload and less-than-carload zoning, less seventy-one cents freight difference, or forty-four cents per hundredweight (Comm. Ex. 854-B and G), as compared with nearby competitors in Kansas and in other locations carrying the same or less freight costs. These unjustified differentials amounted to one-half cent per pound or more in a substantial number of cases. Storage

batteries contain from nine to twelve pounds of lead oxides each. Thus, the above-mentioned discrimination amounted to from four and one-half cents to six cents per battery for the oxides alone. In view of the showing made that during the period from 1936 to 1941, a saving of from five cents to ten cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries, the competitive effects of these discriminations are readily apparent. The record further shows that even during more normal competitive times, customers required to pay the higher prices under the respondents' schedules are at a distinct disadvantage in seeking to compete in the sale of their products with the respondents' more favored larger customers.

1298 Paragraph Eighteen: In the same way that they sold red lead and litharge on a flat par price for all deliveries in a par zone, adding differentials thereto on sales outside of the par zone, each of the respondents after 1934 sold its white lead, both dry and in oil, at the same delivered prices to all customers in the par or base zones, with the differentials shown on the Dry White Lead and White Lead-in-Oil and Keg Products Maps included in these findings added to such prices on sales to all customers in locations outside of the par zones. Such differentials amounted to one-eighth cent or one-quarter cent per pound as between contiguous zones, with a maximum differential of three-quarters cent per pound as between the par zone and any other zone, and there is in the record evidence tending to show the competitive effect of these differences in sales to purchasers in the vicinities of zone borders. The record shows, for example, that white lead is used extensively in the manufacture of outside paints, and four paint manufacturers of St. Louis, Missouri, testified that they used variously from four and one-half to eight and one-quarter pounds of lead pigments to a gallon of white or tinted outside paint. The testimony of these and other witnesses shows that even in normal times the mixed paint business is one characterized by sharp competition; that outside house paint containing lead pigments is the leading competitive item in a paint line; and that in the period from 1936 to 1941, the margin of profit in the sale of ready-mixed outside paint containing lead pigments was so narrow that a saving of not more than five cents in the price of ingredients for a gallon of paint would amount to the

entire profit on some items. It seems clear that in territories near the borders of contiguous price zones the respondents' different prices for their white lead amounting to one-eighth or one-quarter cent per pound involved discriminations as between the purchasers of such products located in the different zones, some of whom, particularly in the St. Louis area, were shown to be in competition with each other.

1299 Respondent National Lead Company offered some evidence to show that on an average basis and taken for each of its selling branches separately, the zone differentials for white lead reflect no more than average differences in freight costs in doing business as between the zones. In the view of the Commission, however, the fact that the average costs of shipping to customers over an area of a dozen or more states amounts to some arbitrary figure does not justify the discriminations which result in particular transactions with individual customers located in border territories.

Paragraph Nineteen: In selling dry white lead, basic carbonate, in both the par zone and the twenty-five cents premium zone, each of the respondents allowed a difference of one-quarter cent per pound under its published card prices on carload shipments of twenty tons or more. Data submitted by the respondents shows that in most cases in which rail freight was a factor the difference between carload and less-than-carload freight rates on white lead were sufficient to justify this price difference. It appears, however, that all of the cost data in the record concerning this twenty-five cents price difference has to do with transactions in which rail freight was involved, and the claimed justification for the differentials is based exclusively on the showing that the price difference was less than the differences between the average freight costs. In this connection, the record shows that the principal paint manufacturing centers of the United States are located in and around St. Louis, Missouri, Chicago, Illinois, Philadelphia, Pennsylvania, and New York, New York, all of them cities containing a white lead producing plant of one or more of the respondents. Furthermore, each of these five areas is among the most substantial consuming areas for dry white lead in the country, and in each of the areas the mode of delivery of lead pigments is local cartage and rail freight is not a cost factor. There are figures in the

record, for example, showing that in 1941, 1,381,000 pounds of dry white lead were sold in St. Louis, in which only local deliveries were involved. The record contains no evi-
1300 dence whatever tending to justify on a cost of delivery basis or otherwise the one-quarter cent differential as to customers in these areas and under these circumstances, and apparently the respondents recognize that this is so since the cost data introduced for the purpose of justifying the differential (Resps.' Ex. 215-A and B) all sales to customers in and around the manufacturing plant cities were pointedly omitted. In view of the competitive situation in the mixed paint industry, and particularly the evidence showing the effect on a paint manufacturer of a saving of as little as five cents in the cost of ingredients of a gallon of outside paint, it is clear that the differential of one-quarter cent per pound between carload and less-than-carload shipments of dry white lead allowed by each of the respondents in the producing areas was discriminatory.

Paragraph Twenty: (a) The respondents' inter-zone prices of lead pigments were in fact different prices. They differed to the extent of the zone premiums, and were justified only where the additional freight or other transportation costs equaled or exceeded the zone premiums. Where the differences in freight or other transportation costs did not equal or exceed the differences in price, the different prices to competing purchasers were discriminatory. The employment by each of the respondents of these inter-zone differentials has had the tendency of lessening competition between customers of the sellers located in different zones who were in competition with each other in the sale of paints, storage batteries and other products manufactured by them and of creating a trade advantage in favor of customers in the par zones and elsewhere who have received the lower prices.

(b) The respondents' differing prices as between carloads and 5-ton lots of oxides and as between 5-ton lots and smaller quantities, and the extra zone charges for less-than-carload quantities sold in the States of Montana, Wyoming, Colorado and New Mexico were not justified by differences in costs of manufacture, sale or delivery, and were discriminatory as between competing purchasers. The effect of these discriminations was shown to have been substantial and to have had the tendency of lessening

1301 competition as between large and small customers of the sellers to the injury of the latter.

(c) The allowance by the respondents of a difference of one-quarter cent per pound on shipments of dry white lead, basic carbonate, in carload quantities was justified on the basis of differences in the costs of delivery in those instances in which rail freight was a factor, but was not justified in cases of sales to purchasers in the proximity of the respondents' producing plants, where the only transportation cost was local cartage. To this extent and in these circumstances, the differing prices to competing customers as the result of such allowances were discriminatory and have had the tendency of lessening competition as between the respondents' customers receiving the different prices.

Paragraph Twenty-One: (a) In response to Count I of the amended complaint, the Commission is of the opinion, and therefore finds, that the acquisition by the National Lead Company of the major portion of the lead pigments processing industry, its control by contract of the major portion of the domestic production of pig lead, and its cooperation with the respondent The Eagle-Picher Company in maintaining identical prices and terms of sale of lead pigments between them and in circumscribing the price competition of their smaller competitors and inducing conformity on the part of such competitors with their prices, terms and conditions of sale had the tendency and effect of restraining trade, suppressing price competition and creating monopolistic conditions in the lead pigments industry.

The Commission is of the further opinion, and finds, that the tendency, capacity and effect of the combinations, conspiracies, agreements and understandings entered into and maintained by all of the respondents, and the acts, practices and methods performed thereunder and in connection therewith, as herein set forth, have been to substantially hinder, frustrate, suppress and eliminate competition among the respondents in the interstate sale of lead pigments; to prevent price competition among and between the respondents in the sale of lead pigments in, among and between the various States of the United

1302 States; to deprive purchasers of lead pigments of the benefits of price competition among the sellers; to create discriminations in price against some purchasers and users of lead pigments and lead pigment paints; and other-

wise to promote the purposes of their combinations, conspiracies, agreements and understandings to fix, adopt and maintain uniform prices and terms and conditions of sale of lead pigments.

(b) In response to Count II of the amended complaint, the Commission is of the opinion, and therefore finds, that the effects of the discriminations in price described in these findings, engaged in by each of the respondents, may be substantially to lessen competition in the interstate sale and distribution of lead pigments between the respondents and their competitors; to tend to create a monopoly in the lines of commerce in which the respondents are engaged; and to injure, destroy or prevent competition in price and otherwise between said respondents and their competitors in the interstate sale and distribution of lead pigments.

The Commission is of the further opinion, and finds, that the additional effects of the aforesaid price discriminations by each of the respondents may be substantially to lessen competition between the purchasers of lead pigments receiving the lower prices from the respondents and other purchasers of such products competitively engaged with said favored purchasers and who pay the higher prices; to tend to create a monopoly in the lines of commerce in which purchasers from the respondents are engaged; and to injure, destroy or prevent competition in the lines of commerce in which such purchasers from the respondents are engaged as between the beneficiaries of the lower prices and competing purchasers who are required to pay the higher prices.

Conclusion.

(a) The acquisition by the respondent National Lead Company of the physical assets and stock ownership of its competitors and the combinations, conspiracies, agree-
1303 ments and understandings of all of the respondents and the acts and practices pursuant thereto and in connection therewith, under the conditions and in the circumstances herein set forth, have constituted unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by each of the respondents as herein found have constituted violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing

laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act).

(b) The amended complaint in this proceeding also purported to charge that each of the respondents, through the use of the zone method of pricing and selling its lead pigments, has discriminated in the price of said pigments as between competing customers in the same territorial division or zone. In this connection, however, the amended complaint does not state a cause of action. The allegations are in effect that each of the respondents sells its products in accordance with a zone delivered pricing method and practice, but the alleged discriminations relied on as constituting injury to competition are the differences in the net prices received by each of the respondents at its mill. Thus, the complaint does not clearly show that the alleged unlawful discriminations as between purchasers of the respondents' products who are located in the same zone occur as the result of differences made in actual prices at which the respondents sell their products. For this reason, the Commission is of the opinion that this charge of the complaint should not be further considered.

In support of the allegation that each of the respondents also discriminates in the price of its lead pigments as between competing purchasers of such products by arbitrarily classifying its customers to receive different quantity, trade and regional discounts from quoted prices, certain evidence was introduced tending to show that each of the respondents (1) maintains differentials of twenty-five cents between 100-pound, 50-pound, 25-pound and 12½-1304 pound containers of one hundred pounds of lead-in-oil and other keg products; (2) quotes and sells 97% red lead Pb_3O_4 at one-quarter cent per pound over lower grades and 98% red lead Pb_3O_4 at one-half cent per pound over lower grades (this practice was not engaged in by respondents Anaconda and International); and (3) employs a price differential of one-quarter cent per pound as between quantities of five hundred pounds and less of white lead-in-oil and other keg products. It appears from the record as a whole, however, that the different charges based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs of the containers; that the differing charges between the grades of red lead probably did not exceed the differences

in the costs of the extra processing required to produce the higher grades; and that the differential of one-quarter cent per pound as between five hundred pounds and smaller lots of white lead-in-oil was not shown to have resulted in any adverse competitive effects.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

Jas. M. Mead,
Chairman.

Issued: January 12, 1953.

Attest:
D. C. Daniel,
Secretary.

1305 BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—5253)

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commis-
1306 sion having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its con-

clusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which
1307 prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically
1308 matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

1309 It Is Further Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

Opinion of the Commission and dissenting opinion by Commissioner Mason are attached.

1310 BEFORE FEDERAL TRADE COMMISSION.

• • • (Caption—5253) • • •

Commissioners:

James M. Mead, Chairman
Lowell B. Mason
John Carson
Stephen J. Spingarn
Albert A. Carretta

OPINION OF THE COMMISSION.

By Mead, Commissioner:

The amended complaint on which this case was tried is in two counts. It charges in Count I that the respondent, National Lead Company, has violated the provisions of the Federal Trade Commission Act by monopolizing, and attempting to monopolize, and acting to control the sale of lead pigments and the prices thereof, through the acquisition of competitors, and otherwise; that the respondent National and the other six respondents have combined and conspired to suppress and eliminate competition in
1311 the sale of lead pigments through the use of a territorial or zone system of pricing and various other practices; and that each of the respondents in carrying out the alleged conspiracy, and for the purpose of suppressing competition in the sale of lead pigments, has engaged in and continued a number of unfair, oppressive and discriminatory acts, methods and practices in the sale of these products. In Count II, each of the respondents is charged with having violated subsection (a) of Section 2 of the amended Clayton Act through price discriminations resulting from the use of zone delivered pricing methods and the employment of various type of discounts granted to some of its customers and withheld from others. The answers filed by the several respondents admitted many of the factual allegations regarding the use of the zone pricing system and the acquisition of competitors by respondent National, but denied that any of the practices were in violation of law, and the case was fully tried before a hearing examiner, whose recommended decision, together with the

exceptions thereto, have been carefully considered by the Commission.

On the conspiracy phase of the case, it is shown in the findings that in the late summer and fall of 1933 the respondents met together in various subcommittees of the Lead Industries Association for the ostensible purpose of drafting a supplemental code of fair competition for the Lead Pigments Industry under the National Industrial Recovery Act; that the respondents, however, did not confine their discussions to proposals to be included in the code, but rather availed themselves of the opportunity of appraising generally the methods of selling theretofore employed in the industry; and that they proceeded to cooperatively revise their pricing practices in a manner far beyond the sanction of the National Industrial Recovery Act. The fact that each of the respondents thereafter followed the pricing practices and adhered to the terms and conditions of sale agreed upon during this period, and the results of the use of these acts and practices, were clearly established.

1312 Various officials of the respondent companies testified that there were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true, as the respondents contend, that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. It is well settled, however, that no formal agreement is necessary to bring into existence an unlawful conspiracy and that a combination prohibited by law may, and often must be, found in a course of dealings or other circumstances in the absence of any exchange of words (*United States Malsters Association, et al.* v. *Federal Trade Commission,* 152 F. (2d) 161; *Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission,* 152 F. (2d) 478). Moreover, as said by the Court of Appeals for the Seventh Circuit in the case of *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321, 332, "The rule stated in *Interstate Circuit* v. *United States,* 306 U. S. 227, and *U. S.* v. *Masonite,* 316 U. S. 265, applies here. 'Acceptance by competitors, without previous agreement, of in invitation to participate in a plan, the necessary

consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act.' It is also sufficient to establish unfair methods of competition under the Federal Trade Commission Act." In some respects, particularly in the respondents' use after 1933 of the zone pricing system, the facts in this case are strikingly similar to those before the Court in the case of *Fort Howard Paper Company, et al.* v. *Federal Trade Commission*, 156 F. (2d) 899. In discussing the situation there presented the Court said:

"As we have already observed, we have here a finding of the existence of an agreement to suppress competition. This finding of the Commission was made upon all the evidence, including the conditions existing in the industry. It was not a finding based simply on inference. It was a finding of fact based on actu-
1313 alities. The existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials, by six manufacturers located at different places, was not a happenstance. Nor, looking at the situation objectively, was it the inevitable and inescapable result of keen competition in a standard product in invariable qualities. To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably match a price which is higher than that at which he needs profitably to sell, unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices) that elimination of all competition was economically preferable.

"True, convenience of the use of zones is not to be denied, but mere convenience does not induce competitors approximately one-third of the nation's width apart to consider themselves concentric in mapping of zones. One glance at the three zone map for bulk

crepe will show the artificiality of the zone structure and intention to obviate any natural advantage of location from price determination. Two of the companies are located in Wisconsin, and the western limits of the zone run merely to the Mississippi River while the eastern boundary runs to the Atlantic
1314 Ocean. Zone 1 is obviously drawn to include all manufacturers and put them on a par. The unfairness of this is shown by the fact that a purchaser in the adjacent states of Minnesota and Iowa would pay the additional fixed price differential to that paid by purchasers in the remote New England states. The zoning system here employed is an enormous exaggeration of the basing point system, having nineteen states as the focal basing point. The packaged crepe zone system split the nation (but not into equal halves) into two parts.

"The zoning system arose under the NRA, which fact saved its illegality for the statutorily exempt period. When that immunity was lifted the illegality was again apparent and it is more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement." (PP. 906-907.)

In this case, the abritrary nature of the zones used by the respondents is even more apparent than it was in that case. As shown in the findings, respondent National maintains in St. Louis, Missouri, a large plant producing various lead pigments, and sales of white lead-in-oil and "keg products" in Missouri outside the city limits of St. Louis take the Zone 2 price, carrying a premium of 12½ cents per hundredweight over the par zone price. At the same time, shipments of these products are made to Minneapolis, Minnesota, at the basic or par price. A red lead and litharge plant is maintained by National in Dallas, Texas, where 75 cents per hundredweight is added on sales of such products in kegs or cans in that city. Another red lead plant is maintained by National in Atlanta, Georgia, which is in Zone 4 for "keg products", carrying a 37½ cents premium on price, and in Zone 2 for red lead and litharge sold as "dry products", carrying a 25 cents premium. Eagle-Picher maintains mining, smelting and pigment producing operations in the "Tri-State" field of Oklahoma, Kansas

and Missouri, states which fall in Zones 5, 3 and 2, respectively, for "keg products". As the Court recog-
1315 nized in the Fort Howard Paper Company case, it is unreasonable to assume that this exaggeration of the basing point system could have arisen and been followed these many years without some understanding on the part of the respondents.

In connection with the use by the respondents of the agency or consignment method of selling, the various differentials employed, and the issuance of uniform suggested resale prices, the evidence discussed in the findings also discloses understandings and cooperative endeavors which, when considered in the light of the surrounding circumstances, leads the Commission to the conclusion that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of them to follow it.

The Commission is of the opinion, therefore, and accordingly has found that there existed among the respondents an unlawful conspiracy to fix and maintain prices, differentials and terms and conditions for the sale of lead pigments, which conspiracy was carried out by all of the respondents through the various methods set forth in the findings.

Respondent National Lead Company, upon its organization in 1891, acquired the physical properties and stock ownership of sixteen different companies theretofore engaged in the business of producing lead pigments and other lead products, and at the same time acquired the controlling stock interests in seventeen other companies engaged in the lead pigments and related businesses. In 1906, it acquired all of the stock of United Lead Company, which had been organized in 1903 and which, in turn, had acquired thirteen other companies controlling many of the principal alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. In the same year, National acquired Carter White Lead Company, of Chicago, Illinois, and Omaha, Nebraska, and in 1912 it acquired all of the stock of Mathieson Lead
Company. The stock of Bass-Hueter Paint Company
1316 was acquired by National in 1916; the properties and assets of Hirst and Begley Company in 1919; the properties of Wetherill and Brothers in the 1930's; and

some time between 1931 and 1933 National acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia.

As a result of these acquisitions, culminating in the disappearance of over fifty competitors in the period from 1891 to 1935, respondent National emerged in a position of practical dominance in the Lead Pigments Industry. As an indication of this fact, the record discloses that during the period from 1936 to 1942, respondent National accounted for between 60% and 63% of the shipments of white lead-in-oil, from 30% to 35% of the dry white lead, basic carbonate, and approximately 50% of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8% of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53%. The record further shows that after 1935 the only concern left in the lead pigments business with any practical ability to challenge National's supremacy was The Eagle-Picher Company, and that beginning in 1930 and continuing through 1935, efforts were made by National to acquire a controlling stock interest in this producer also.

In the meantime, National's relationships with American Smelting and Refining Company, the world's largest smelter and refiner of metallic lead, the basic raw material from which lead pigments are manufactured, is a matter of particular importance. In February 1906, at the time of its acquisition of the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which National acquired control of 85% of A. S. & R. Company's domestic production of pig lead, provisions for the price of which were included in the contract, and restricted its use of pig lead produced by its own subsidiary to 1317 30,000 tons per year. Under the same contract A. S. and R. Co. secured 85% of National's requirements of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might need. This contract remained in effect until 1921, when it expired, whereupon the contracting parties made other arrangements. Simultaneously with the execution of the contract between respondent National and American Smelting and Refining Company, another con-

tract was entered into between Hoyt Metal Company, a constituent company of respondent National, and American Smelting and Refining Company, under the terms of which National acquired control over all of A. S. & R. Company's output of antimonial lead.

Together, the above arrangements between National and A. S. & R. Co. contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32% of the domestic production. They also fixed a monthly average price for pig lead which prevented the basing of prices of this product on daily market fluctuations, and thus restricted opportunities of buying pig lead at lower prices. In addition, the agreements resulted in American Smelting and Refining Company taking no further interest in the manufacture of lead pigments.

In the circumstances, it is clear to the Commission that the purpose and effect of National's acquisitions, aided by its arrangements with American Smelting and Refining Company, were to substantially control the lead pigments industry and to regulate the price of the principal basic raw material used in the manufacture of lead pigments. It is equally clear that if in the future National should be successful in acquiring the capital stock control or the assets of The Eagle-Picher Company, or of any of the other concerns now engaged in the manufacture or sale of lead pigments, its position of dominance in the industry will be strengthened even more. The question whether National has already attained such a monopolistic position as to require its dissolution was not tried in this proceeding; nor is it necessary in support of the Commission's authority to act for this question to be determined. As the legislative history of the Federal Trade Commission
1318 Act clearly shows and as the courts have uniformly held, it was not the primary object of that Act to provide a means of breaking up an accomplished monopoly, but rather to enable the Commission to stop monopoly in its incipiency (*Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643; *Fashion Originators' Guild of America, Inc., et al.* v. *Federal Trade Commission*, 312 U. S. 457). In 1920, the Supreme Court in the Gratz case recognized this Congressional intent by declaring that unfair methods of competition might include not only methods that involved deception, bad faith and fraud, but also methods that involved "oppression" or which are "against

public policy because of their dangerous tendency to hinder competition or create monopoly" (253 U. S. 421, 427). In the Beechnut case, decided in 1922, the Supreme Court made a distinction between combinations and conspiracies under the Sherman Act and unfair methods of competition under the Federal Trade Commission Act, and held that the practices of the single trader there involved was a "system" which "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in channels of interstate trade which it has been the purpose of all the antitrust acts to maintain", and that it was "within the power of the Commission to make an order forbidding its continuation" (257 U. S. 441, 454). And in the Cement Institute case, the Court stated the applicable law as follows:

> "In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law, constitute an 'unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. The Commission and the Courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.' This general language was deliberately left to the 'Commission and the courts' for definition because it was thought
> 1319 that 'There is no limit to human inventiveness in this field; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an 'endless task.' See *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 310-312, and congressional committee reports there quoted." (333 U. S. 683, 708.)

Having found from the evidence before it that the acquisitions of competitors by respondent National, aided by its arrangements with American Smelting and Refining Company, have had the tendency and effect of restraining trade, suppressing price competition and tending dangerously to

create a monopoly in the lead pigments industry, the Commission is of the opinion that it not only has the authority but that it is under a duty to prohibit the further aggrandisement of this respondent through additional acquisitions.

In addition to charging the respondents with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of Section 2(a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the complaint fails to state a cause of action. This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but the alleged discriminations occur as a result of differing net prices received by each of the respondents at its factory. Thus, the complaint does not show
1320 that the alleged unlawful discriminations as between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' products are sold. Certain of the other price differences resulting from the classification of customers to receive different quantity, trade and regional discounts either were no more than allowable differences in the costs of containers or were not shown to have resulted in any substantial adverse competitive effects. None of the practices involved in these charges is covered by the order to cease and desist.

As set forth in the findings, each of the respondents after 1934 sold its various lead pigments on the basis of flat delivered prices to customers located within designated zones, with uniform differentials added to these par zone prices in sales outside of the par zones. These inter-zone prices were in fact different prices, differing by the amount of the zone premiums, and could be justified only where the additional freight or other transportation costs exceeded the zone premiums. No such justification was made by any respondent.

The respondents since 1934 have also consistently quoted and charged different prices for their lead pigments as between carload purchasers and less-than-carload purchasers. In the case of oxides, the carload price has been based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities has been 40 cents per hundredweight higher on quantities of five tons and 90 cents per hundredweight higher on quantities of less than five tons. In a substantial number of cases these price differences have been much more than the differences between car and less-than-car freight rates and have resulted in an excess charge over delivery costs as high as 88 cents per hundredweight against the purchasers of smaller quantities. In the case of dry white lead the price difference as between carload shipments and less-than-carload shipments has been ¼ cent per pound. In most cases in which rail freight is a factor this price
1321 difference is justifiable on the basis of differences between carload and less-than-carload freight. However, no effort was made by any respondent to justify on a cost of delivery basis or otherwise the ¼ cent differential as to customers in areas in which the mode of delivery is local cartage and rail freight is not a cost factor.

The record shows that large quantities of oxides are sold by the respondents to manufacturers of storage batteries and that large amounts of white lead are sold to manufacturers of mixed paints. During the period from 1934 to 1941, conditions in both the storage battery industry and the mixed paint industry were such that the competitive effects of the respondent's discriminations were readily apparent.

The storage battery industry consists of more than 200 companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose total production may be less than 50 batteries per day. Certain of these manufacturers, including the larger ones, are located in the respondents' par price zone, while others competing with them in the sale of batteries are located in premium zones, where the delivered price of oxides to purchasers in lots smaller than five tons is almost $6.00 per barrel higher than the price to the manufacturer in the par zone purchasing his oxides in carload lots. The evidence is that during the period from 1934 to 1941 the storage battery industry was characterized by

particularly sharp price competition and that a saving to a manufacturer of from 5 to 10 cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries. So bad was the situation and so narrow were profits during this period, according to one small manufacturer from St. Louis (a purchaser of oxides in lots smaller than carloads), that "the only way we could get by and make a living was to use the old battery cases over again", that the competition of other sellers, including Sears-Roebuck Company (the battery manufacturing subsidiary of which was a purchaser 1322 of oxides in carload quantities), was such that his enterprise had gone "broke", and that his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck. By other evidence it is shown that during the period from 1935 to 1941 large battery manufacturers located at a considerable distance from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other lead pigment producing centers, at prices which were actually below the cost of manufacture of comparable products to the smaller battery producers located in such centers.

In this situation, the respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par zones and the premium zones, making a difference in the cost of oxides of from 4½ to 6 cents per battery against the smaller battery manufacturers located in the premium zones, obviously has had the tendency to injure competition as between the larger and smaller manufacturers. Similar considerations lead to the same conclusion with respect to the price differences on sales of white lead, both dry and in-oil.

In any case in which activity violative of the statutes administered by the Commission is found to exist, it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to take every precaution to preclude its revival. In many cases, and particularly in trade restraining conspiracies, a solution of this problem involves the consideration of many factors, including the history of the collective activity and the manner in which it originated. In this case, it was the purpose and the intent of the respondents during the NRA period to cooperatively revise the pricing practices in the lead pigments industry and as a principal part of this re-

vision to establish a uniform zone pricing system. Detailed discussions of this matter were carried on in the meetings held in 1933 and 1934 at which the several respondents were represented. Maps showing the boundaries of the zones to be observed in fixing the delivered prices of the several products involved were distributed; and 1323 each of the respondents since that time, with minor variations, has followed the pricing system and adhered to the zone boundaries so discussed and shown on these maps. In this situation, and in order to effectively break up the conspiracy, the Commission in its order in this case is providing not only that the respondents cease and desist from "entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy" to engage in the practices found to have been engaged in, but also that each of the respondents individually cease and desist from selling its lead pigments at prices calculated in accordance with a zone delivered price system "for the purpose or with the effect of systematically matching the delivered prices quoted or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated.

While the complaint did not in Count I attack the zone pricing practices of each of the respondents aside from the conspiracy, it did in effect allege that each of said respondents, acting pursuant to and in furtherance of the conspiracy, used the zone method of selling. It further alleged that each of them used that system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves." Thus, the prohibition against the use by each of the respondents of a zone delivered pricing system where the purpose or effect is to systematically match the quotations or prices of competitors runs directly against the pricing practice alleged to have been engaged in and is fully justified under the

1324 complaint. In the Commission's opinion, it is also appropriate to eliminate the effects of the respondents' price-fixing conspiracy and to guarantee against the continuation of that conspiracy.

The six respondents in this proceeding account for practically the entire production of lead pigments in the country, there being only a few small producers offering such products for sale in commerce in the United States other than said respondents. It is to these respondents that purchasers in commerce throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available. The maintenance of the delivered price zones and the quotation of delivered prices therein constituted the very cornerstone of the respondents' conspiracy. It was the adherence by each of them to this system of pricing that made the combination work. It was in this way that the matching of prices, one of the objectives of the conspiracy, was accomplished. Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture.

The Commission is cognizant of the fact that identity of prices may result from either competitive or non-competitive situations and that the intensity of competitive factors may vary in degree in any industry. Perfect competition, like the perfect price conspiracy, may be hoped for but is rarely obtained. The pricing pattern as used in this industry and as described in the findings as to the facts was not the result of one secret meeting in a smoke-filled room. It is the result of many business experiences and compromises over a period of years.

1325 In the absence of direct admissions of guilt, allegations that sellers have established a zone pricing conspiracy usually present difficult problems for the finder of the facts. In the typical basing point conspiracy case the conspirators (the sellers) must determine the bid price of the commodity delivered at the door of each buyer and this price usually varies with the cost of rail freight from the basing point to the point of delivery. Each seller,

therefore, under the basing point system must usually have and use the same freight rate book or other device used by each of the other sellers so that to quote identical prices each seller will use the same figure for the cost of the freight. That is the reason bids under that system have identical prices to the fraction of a cent. Under the basing point system the conspirators must be continually alert and careful in figuring their bids in order to quote identical delivered prices.

By comparison, the zone conspiracy pricing system operates rather simply. Under the basing point system delivered prices, while usually identical at each point of delivery, vary as between different delivery points in the same amounts as do the estimated costs of rail freight from the basing point. In a zone system of pricing the delivered price is the same for every point of delivery within a zone. A zone comprises several states. Once the price in the par zone has been established and the relative price graduations in the other zones have also been established, the system operates substantially automatically and with a minimum of conspiratorial guidance. What would be the situation if the Commission issued only the usual type of conspiracy order in this case—that is, to discontinue agreeing to fix prices, etc.

After the order is issued the respondents might continue to use the same zone pricing system and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist. The respondents, however, would be enjoying all the fruits of their conspiracy—the rigged pricing pattern—and the momentum of the system, so firmly and maturely es-
1326 tablished, might last for some time unless effective measures to break it up were taken. That is the purpose of the paragraph of the order to cease and desist directed against each of the respondents individually. For purposes of illustration, let us assume that these seller-respondents were at one time struggling up the long and difficult hill of competition. Let us assume they were operating independently of one another, each one independently making his own decisions as to the production and asking price of his commodity. The road was hard. The potential rewards and the risks were great. There came upon the scene the siren song describing the advantages of

"stabilizing the market" and the avoidance of what is sometimes referred to as "cut throat competition" but which very often is plain unvarnished price competition. The respondents succumbed to the blandishments of this siren song of claimed stability and were lulled into a false sense of security. A competitive industry is a self-disciplined industry. Competition also supplies the needed dynamics. A non-competitive and therefore a non-disciplined industry becomes lethargic and clings to the status quo. Under an expanding dynamic economy, an industry cannot maintain the status quo—it must either move forward or lose ground. The less alert industry with its blunt blade of competition lags behind and may lose its relative place in the market to a newer and more aggressive industry which will accomplish the same end at a lower price.

The purpose therefore of this order is to aid in substituting for the competitive lethargy which has existed in this industry in recent years a condition of sharp and healthy competition. It is hoped that it will be effective in dissipating the dregs of the conspiratorial pricing pattern and that it will bring to this industry, not the gentlemanly understanding at the Country Club or the suave unexpressed agreements of the sales managers over a friendly Scotch and Soda, but the hard price competition of the market places which may not be gentlemanly but is usually fair, particularly to consumers. In such competition the weak might get hurt, but social security is not the province of this Commission. The only way to have competition is to compete. If after competition is restored any of the respondents can make a proper showing to the Com-
1327 mission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law.

The majority of the Commission believes that its power to take the steps it feels necessary to correct the evils found to exist in this industry cannot be seriously questioned. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly (cases previously cited), have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation* v. *Federal Trade*

Commission, for example, the Court of Appeals for the Third Circuit in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

> "* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." (121 F. (2d) 968, 971-972)

In the case of *Local 167* v. *United States*, 291 U. S. 293, 299, involving conspiracy among a number of defendants, the defendants sought to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

> "The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort
> 1328 that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators."

In *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 435-437, the Supreme Court said—

> "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.
>
> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.
>
> "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of

which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past."

In the case of *Haskelite Mfg. Corporation* v. *Federal Trade Commission*, the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. (2d) 765, 766).

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful acts", referred to by the Court in the Express Pub-
1329 lishing Company case. Even acts lawful in themselves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the *Ethyl Gasoline* case (*Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

> "Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." (P. 461.)

Two years later in the case of *United States* v. *Univis Lens Company, Inc., et al.*, 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes." (P. 254.)

In view of all of the foregoing, the Commission is of

the opinion that the prohibition in the order against the persistent, continuing and intended matching of prices through the use by each of the respondents of a zone delivered pricing system is particularly appropriate.

1330 BEFORE FEDERAL TRADE COMMISSION.

* * * (Caption—5253) * * *

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON.

Two important questions will be answered by what the reviewing courts do with the decision in this case.

First, does this agency have the same scope as a court of equity in the issuance of injunctions?

Second, may the implied conspiracy doctrine be extended to control the general pricing patterns of individuals unassociated with conspiracy? In other words, may the implied conspiracy doctrine be extended to prohibit nonconspiratorial but conscious parallel action?

The order in this case does both, frankly and without equivocation (a fact that should earn the gratitude of all interested in clarity).

Chairman Mead points out in his able opinion that the majority believes the Commission, like courts, may frame its decrees, not only to suppress unlawful practices, but may also take other measures to preclude any possible revival of prohibited acts.

The Commission does not have, and in my opinion it should not have, the general injunctive powers of a court. As was said by the Supreme Court in the Eastman Kodak case: "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers."[1]

The instant order would enjoin National Lead from acquiring competitors even if there was no adverse
1331 effect on competition, and it would enjoin all defendants from "conscious price parallelism"[2] sans conspiracy.

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1. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619.

2. This phrase has been so bruited about that what it means depends on who says it. One thing is certain, however. Everyone agrees it is not of itself illegal. See the Commission's agreed order in *Federal Trade Commission* v. *U. S. Steel Corporation*, Docket 5508.

If we may enjoin acts which are lawful, there will be no further occasion for the judicial process, so far as Government control of business is concerned. As it is now, we are unencumbered with the same rules of evidence[3] or the requirement of full disclosure of charges before trial that courts must observe. Moreover, our findings, embellished as they are with the stamp of expertise, do not attract the same vigilance reviewing justices give findings of *nisi prius* courts.[4]

With equity court powers, but untrammeled with their restrictions, we can make short shrift of those protections to men's liberties that courts so meticulously observe.

We may say with Lady Macbeth, "What need we fear who knows it, where none can call our power to account?"

On the side of speed there is much to recommend our replacing equity courts. On the side of justice there is much to give us pause, for the instant order assumes injunctive powers never dreamed of by the legislature that created us—authorities heretofore never invested in an agency already functioning as investigator, grand jury, prosecutor and petit jury combined.

1332 We are not a court. We are simply a self-operating combination of a grand and petit jury.

Like a grand jury, if we believe the public interest warrants, we issue a presentment to be tried either before ourselves or our hearing examiners in lieu of a petit jury. But, sitting in our quasi-judicial robes, we may go no further than to inhibit those acts we found unlawful in our findings of fact while we sat in our expert jury box.

Thus we may prohibit a man, who advertised brass salt cellars as gold, from doing so again. By the same order, we may ban all related unlawful acts. But to say we may enjoin the man from ever selling salt cellars again is to exercise equity court powers not included in the budget of this agency.

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3. The Commission is not "restricted to the taking of legally competent and relevant testimony."

4. Federal Trade Commission findings will not be disturbed if on consideration of the whole record they are supported by "substantial evidence." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Equity court's findings are more vulnerable on appeal and may be set aside under the "clearly erroneous" test. A reviewing court generally abdicates the right to review factual findings of a trial judge on the ground that it will not substitute its judgment on weight of the evidence for that of the judge who hears witnesses and observes their demeanor on the stand. In this respect we Commissioners are no better off than appellate courts. We do not see witnesses face to face. We only read the record of a case after it has been adduced before a trial examiner.

Thus we may prohibit defendants from conspiring together to fix prices but we cannot make one man's legal price illegal merely because others follow. Nor can we foreclose an entrepreneur from quoting any price he chooses merely because someone else got to the market place first with a similar price.

We may prohibit a company from acquiring a competitor if it impairs competition or tends to a monopoly, for that we know to be illegal; but we cannot gaze into a crystal ball and find as a fact today that any or all acquisitions in the near or distant future will be illegal.

The findings of fact and order based on count one violate this latter truism. National Lead is perpetually enjoined against acquiring any competitors. We have sought here to issue an injunction similar to those issued by courts.[5]

While the courts do not need to follow the statutory form required of the Federal Trade Commission by Section 7 of the Clayton Act, they have at times done so, as in *United States* v. *Allied Van Lines* (D. C. N. D.—Illinois,

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5. The following equity court injunctions contain (in one or another respect) commands which neither Section 5 of the Federal Trade Commission Act nor Section 7 of the Clayton Act give the Federal Trade Commission the right to issue:

In *United States* v. *National Cash Register Company* (D. C. S. C.—Ohio, Eq. No. 6802) the court prohibited defendants from acquiring any competitors engaged in the same kind of business as the defendants were engaged in, with a proviso that if it could be proved under a later petition that said acquired company could supplement the defendant's business, and that the such acquisition would not substantially lessen competition, the court reserved the right to give approval to such acquisition.

In *United States* v. *Hartford Empire* (D. C. N. D.—Ohio, No. 4426) defendants were prohibited from acquiring the business of a competing firm, unless such acquisition was approved by the court.

In *United States* v. *Foster Kleiser Company* (S. D.—California, Eq. No. R-31-M) defendants were prohibited from acquiring competitors *until further order of this court.*

In *United States* v. *General Outdoor Advertising* (D. C. S. D.—New York, Eq. No. 46-50) the defendants were prohibited from acquiring any additional display plants (except by way of replacement of an existing plant now owned by the defendant) *where the purchase of such acquisition is primarily to exclude competition from the outdoor advertising industry.*

In *United States* v. *Central West Publishing Company* (D. C. N. D.—Illinois, Eq. 3088—1912), the court prohibited the defendant from acquiring any other company engaged in the same type of business as defendant's.

In *United States* v. *Eastman Kodak* (D. C. W. D.—New York, Eq. A-51) the defendants were enjoined from acquiring any competing plant, for *the purpose or with the effect of* restraining trade or creating an unlawful monopoly.

In *United States* v. *California Associated Raisin Company* (D. C. S. D.—California, Eq. No. B-67), defendants were prohibited from acquisition of any competitors which would eliminate or decrease competition in interstate commerce.

No. 44-C-30), and in *United States* v. *American Thread Company* (D. C. N. J. Eq. No. 312). In these cases the courts limited their injunction to the acquisition of specific competitors named in the bills of complaint.

1333 On December 31, 1952, the Federal District Court of Massachusetts entered a consent judgment enjoining Hood & Sons and Whiting (milk companies) perpetually from selling the business of one to the other, and further enjoined the two Hood defendants *for a period of time* from acquiring any milk dealers in *specified localities*. Hood & Sons are also required to divest themselves of certain country milk stations located in Maine and Vermont, and to limit the use of others.

1334 Generally speaking, however, equity injunctions are composed on the spot (played by ear, as it were) to fit the particular need of the case as the chancellor saw it. Take for instance, *United States* v. *Gamewell Company* (D. C.—Massachusetts, No. 6150); there the defendant was prohibited from acquiring any company selling equipment (a) useful only in fire alarm systems, or (b) in connection with the manufacture of fire alarm systems.

As can be seen from a study of the above cases, courts often give blanket injunctions which forbid acquisitions of any corporations, even if future acquisitions, standing of themselves, might be legal.

There is no special harm in this because equity courts can maintain a continuing jurisdiction over the actions of their litigants. No one is called to book for disobedience of a mandate without having the opportunity to judicially challenge the same.

This same judicial safety valve is guaranteed defendants when the Federal Trade Commission issues a cease and desist order under the Clayton Act. But even while Section 7 of the Clayton Act in effect endows us with certain injunctive powers (we may order a company to disgorge stock or assets of a specific rival), our injunctive powers are circumscribed—as they should be for an agency holding both prosecuting and fact-finding powers. We may only condemn specific acquisitions rather than issue a blanket injunction against all acquisitions. On top of this restriction, Congress permits judicial reviews, at any future time, of our Clayton Act orders.

Whether it be tomorrow, or a year's tomorrow, the Federal Trade Commission must go to a court for sanction

and penalties. So under the Clayton Act, Federal Trade Commission injunctions are always subject to judicial scrutiny.

But these judicial protections are skipped in the instant case by charging wrongful acquisitions under the Federal Trade Commission Act instead of under the Clayton Act.[6] Here the Commission evades the necessity of condemning specific acquisitions.

1335 Here the Commission sidesteps certain presumptions of innocence defendants are entitled to when hailed before us under the Clayton Act. These presumptions of innocence would hold under the Clayton Act unless a preponderance of the evidence proved that:

1. The defendant acquired stock or assets of a certain company;
2. That company was in competition with defendant;
3. Such acquisition may have lessened competition or tended to monopoly, etc.

Lastly and perhaps the most vital curtailment of judicial protection found in the instant order is the fact that by arrogating general equity injunctive powers under Section 5 of our own Act, we forestall any judicial challenge to our commands sixty days after we have spoken. For the Federal Trade Commission Act is different from the Clayton Act in that its orders become final and not subject to judicial review if the defendants neglect to perfect an appeal within the time limit.

There are other fundamental dangers in endowing a quasi-judicial agency with equity court powers, as the instant case demonstrates. The law under which we operate has no statute of limitations. Statutes of limitation protect the citizen against charges based on ancient accusations, for the unreasonable delay in bringing a respondent to trial cheats him of the fair opportunity to marshal facts in his own defense.

The nexus of the first charge leveled at National Lead is based on events occurring from 1891 upwards. In a court of law, this evidence might be admissible as "background material"; yet it is difficult to imagine any court trained in the evaluation of evidence accepting the same with the hospitality the Federal Trade Commission has accorded it here. For the Commission in 1953 bases a perpetual in-

6. One must not confuse the Commission's order in *Western Meat*, Docket 456, with the instant case. The *Western Meat* order was not a general injunction.

junction against defendant National Lead principally on evidence of consolidations taking place back in Benjamin Harrison's time.

What has been said with reference to the Commission's assumption of general equity powers to inhibit legal acquisitions applies with greater force to inhibiting legal pricing practices. For acquisitions are matters of single import, occurring but infrequently, whilst the right to set a price upon the fruits of one's labor is a continuous unbroken chain of rights that will be destroyed the minute one is commanded to change prices if he becomes conscious of the fact that others are charging the same.

1336 Assuming for the sake of argument (and it is only on this basis that I can make such an assumption) that respondents conspired to fix prices, the Commission, exercising the administrative functions delegated to it under the Act, may only condemn and inhibit that which it finds to be illegal. In the instant case, however, it has not found individual conscious price parallelism sans conspiracy to be illegal. Nevertheless it has condemned conscious parallelism in its order to cease and desist.

Besides enjoining acts which the Commission has not found illegal, it has overstepped the injunctive authority approved by the Supreme Court in *Federal Trade Commission* v. *Cement Institute* (April 26, 1948). There the defendants objected to paragraph one of an order which prohibited respondents from "quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations, or prices for cement at points of quotation, or sale, or the particular purchases by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents."

These words would have a familiar ring when compared with the order in the instant case but for one important variation—the order in the Cement case was directed solely at conspiratorial concerted action; the order in the instant case is directed at individual activities of each of the respondents—which have not been found to be illegal.

In the Cement case, the court was careful to point out that "This paragraph, like all the others in the order, is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action," and observed that "It is thus apparent that the

order by its terms is directed solely at concerted, not individual activity on the part of the respondents."

Thus far we have dealt with the question, has the Commission exceeded its authority in the instant order.

Now we need to look at another phase of the case. Do the facts support a finding of conspiracy to fix prices?

Let us identify the realistic elements of conspiracy and see if any of them match the facts in this case. Till 1337 now there has never been a quasi-judicial cataloging of the same, nor have the reviews of our cases by courts been of much help in this quarter, for courts act strictly on an ad hoc basis. Their decisions (like the decisions of consulting physicians reviewing the diagnosis of a practicing doctor) give validity to a first judgment but lack value as a general text. Even the eight most important Federal Trade Commission decisions in the realm of conspiracy[7] serve only to tell whether the evidence in each case was substantial enough to carry the Commission's order.

When administrative agencies keep gauging their decisions on what the courts have refused to reverse, there is a general decline—a watering down, as it were—of the preponderance of evidence rule, especially in matters tried before us, for we are not subjected to the discipline of supporting our issues before a separate and disinterested body.[8]

In this matter let us apply the criterion of conspiracy to the facts on the basis of the preponderance of evidence rule, and perhaps at the outset even indulge in the presumption of innocence, a presumption that has become quite outmoded of late.

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7. I nominate these eight: *Salt Producers Assn.* v. *Federal Trade Commission*, 134 F. 2d 354; *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683; *Phelps Dodge Refining Corp., et al.* v. *Federal Trade Commission*, 139 F. 2d 393; *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478; *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974; *Tag Manufacturers Institute* v. *Federal Trade Commission*, 174 F. 2d 452; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899.

8. There are hopeful signs that courts are becoming aware of this. See: *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231; *Ada J. Alberty* v. *Federal Trade Commission*, 182 F. 2d 36; *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, certiorari denied by Supreme Court, December 22, 1952; *Tag Manufacturers Institute* v. *Federal Trade Commission, supra*; *Carlay Co.* v. *Federal Trade Commission*, 153 F. 2d 493; *Federal Trade Commission* v. *Motion Picture Advertising Service*, 194 F. 2d 633, argument completed in Supreme Court this term; *New Standard Publishing Co.* v. *Federal Trade Commission*, 194 F. 2d 181; and *Dearborn Supply Co.* v. *Federal Trade Commission*, 146 F. 2d 5.

What constitutes a conspiracy?

1338 No one definition seems adequate, but certain sign posts are always found along the conspiracy road. History records them and literature dramatizes them so many times that he who runs can read.

In conspiracy there must be secrecy—a Macbeth whispering to his lady; a group of Boston merchants disguised as Indians, a Guy Fawkes hiding with his fellow travelers in the basement of a Westminster house; Madame Defarge knitting the names of aristocrats in her shawls behind the counter of a wine shop in Saint Antoine.

When it is no longer secret, it's no longer a conspiracy—it's a revolution. The farmers who stood on the bridge at Concord, Washington at Valley Forge, Caesar crossing the Rubicon, Luther nailing his thesis on the cathedral door—these people had dropped secrecy of purpose and were no longer conspirators.

Conspiracy is surrounded with a vague and villainous aura, treachery, hidden plotting, surreptitious meetings and codes.

The law condemns conspiracy because it secretly unites the strength and resources of many to a criminal end and is more tolerant of inferences and conjectures of guilt because its insidious means of accomplishment make the conspirators more difficult to apprehend.

Because the law requires less proof at the same time it imposes greater sanctions against conspiracy, implied conspiracy charges have become a practice peculiar to Anglo-American law. This is especially true when a quasi-judicial agency of the Government seeks to prohibit individuals from doing things which are not illegal.

The growing habit of issuing complaints and orders based on the fiction of conspiracy when no substantive offense can be charged against the single acts involved, constitutes a serious threat to fairness in our quasi-judicial procedure.[9]

If secrecy be one of the sign posts of a real conspiracy, what are its elements in the instant case?

1339 During NRA under the spurring of the Federal Government, the defendants were required to draft a so-called Master Code, and later a supplemental code dealing with prices and terms.

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9. My apologies go to Mr. Justice Jackson for purloining his phraseology in *Krulewitch* v. *U. S.*, October Term 1948, No. 143, and adapting it to the rationale in this case.

These codes were drawn at NRA meetings held under the aegis of the Federal Government. Following the pattern of every one of the other 557 industrial conferences, price reporting, terms and conditions of sale, methods of selling, freight and zoning problems, as well as hours and labor conditions, were discussed.

These meetings and discussions are the basis for the findings of conspiracy in this case.[10]

Conspirators about to commit crimes conceal their activities in order to prevent detection, conviction and punishment.

With this in mind, nowhere has the reductio ad absurdum been so complete as in the instant case. Here the foundation of the so-called conspiracy was first heralded in a two-day parade down the main stem of New York City, and on the front pages of every newspaper in the United States. While the evidence in this case does not recite the nation's clamorous and enthusiastic participation in that great experiment in a controlled economy (including price-fixing, production controls, etc.) known as NRA, yet I think we can take judicial notice of the era where the illustrious head of NRA once said:

> We "* * * had to have an aroused militant public opinion echoed like a muezzim over the house tops. * * * There was scarcely a national organization with local representation that was not enlisted and responded enthusiastically. * * * The whole radio system of the country was donated. * * * Influential leaders of every party and creed sponsored the drive. * * * The President asked that every one make his loyalty to the program known by exhibiting a blue eagle with the slogan, 'We do our part.' * * * More telegrams and letters poured into Washington than ever before in the history of government. * * * The
> 1340 enforcement of the law (NRA) was in the hands of the whole people. * * * Like the draft act, the whole law is written to depend on cooperation and popular support. * * * The drive was to get every company under the blue eagle—mobilization of public opinion. Those who cooperated were soldiers against the

10. Paragraph 10 (a) of the majority findings of fact: "The evidence in the record discloses that the meetings and discussions hereinabove referred to during the period from July 1933 to June 1934, resulted in understandings and agreements between and among respondents * * *."

enemy and those who did not were considered the enemy. * * * Climaxed by blue eagle parades all over the country, the one in New York lasting all one day and most of the next night, 96 per cent of commerce and industry was under NIRA."[11]

Today if people were caught doing secretly what in 1934 Government demanded they do publicly, they would be instantly charged with violating the antitrust laws for, as the Administrator of NRA during its heyday said:

"We did not repeal the antitrust laws. We simply ignored them."

"There is not one single code that is not a combination in restraint of trade."[12]

This last statement may be more rhetorical than true. At any rate, the testimony in the instant case discloses that although the code for the lead industry (with all the fixings above described) was approved on May 24, 1934, the respondents and other manufacturers of lead pigments were unwilling to report prices or to follow the terms of sale set forth in the code. They requested the Government and obtained a temporary exemption from that portion of the lead code dealing with the filing of prices and deviations from the terms of sale as well as from other requirements of Schedule A, and at no time was any agreement or understanding reached among any of the respondents as to the use of methods of selling, or zones.

From the evidence in the case it does not appear that this reluctance to fix prices under the prodding of the Federal Government was generated from any fear that the Government was masquerading as an agens provo-
1341 cateur, and a decade later might base a conspiracy charge against the defendants because of these NRA meetings. (See *Federal Trade Commission* v. *National Lead*, Docket 5253.) On the contrary, in my opinion the evidence indicates a healthy and skeptical attitude on the part of the lead pigment entrepreneurs who had no stomach for tying their hands in the competitive battle, no matter how much the NRA wanted them to.

Nor am I willing to cast the Government in such a role

11. "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 255, 261, 203, 250, 267.

12. "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 172, 177.

that it prosecute in '53 for what it spent millions in '33 to accomplish.

Of all the criticisms leveled at Hugh Johnson's NRA, no one ever charged it with playing decoy to 96 per cent of the entire economy. And we do a great injustice to that well-meaning though ill-fated crusade (which, incidentally, put millions of people back to work and added billions of dollars to the market stream) by basing a conspiracy charge on NRA activities at this late date. If we must do this, it seems we have left out as party defendant the greatest conspirator of them all—ourselves.

Nor do I see any comfort in the prosecution's contention that the defendants are not entitled to NRA immunity, for I see no occasion for immunity. Shall those who refused to don the price-fixing paraphernalia the Government offered them be more put upon than the avid participants?

Another sign post along the conspiratorial road is that a conspiracy not only must have a general aim but must be coupled with a specific vehicle. It might be said that we all have the general aim to live, but it will not do to say we are all conspiring to live, or that all businessmen are conspiring to exist, though these may be the planned common purpose of everyone. There must be some central illegal theme, whether the plot be one to carry out through legal means an illegal end, or a legal end through illegal means.[13]

1342 What sign post was there of a central illegal theme in the alleged lead conspiracy? Unlike historic conspiracies which are closely knit and tied to a definite time,[14]

13. Sixteenth Century England was full of conspiracies. Nearly every year had its own infamous example. In 1571 there was the Ridolfi plot, in 1585 Parry's plot, the Babington plot of 1586 (which was the basis for the execution of Mary, Queen of Scots). In close succession there were Polwhele's, Collen's, Squire's, Lopez', Yorke's, and Williams' plots. These conspiracies all had one alleged common purpose—the assassination of Queen Elizabeth, but they were different conspiracies, varying widely in details and timing. Each plot culminated with the participants either at the gallows, in exile, imprisoned, or escaped. But each conspiracy had its own separate design or theme, not part of the others.

14. Sempronius in Addison's Cato exclaims:

> "Conspiracies no sooner should be formed than executed.
> * * * we must work in haste;
> Oh think what anxious moments pass between the birth of plots
> And their last fatal periods.
> Oh! 'tis a dreadful interval of time,
> Filled up with horror all, and big with death!
> Destruction hangs on every word we speak,
> On every thought, till the concluding stroke
> Determines all, and closes our design."

the testimony relating to the alleged lead conspiracy (outside of that dealing with NRA) floats vaguely over many years.

As to this vagueness, I have read the briefs and the relevant testimony, and have listened twice to oral arguments on the merits (as senior Commissioner I sat first with the old Commission, which did not arrive at a decision, and then with the new Commission). I have never observed a charge of conspiracy based on so nebulous a melange of testimony as here presented.

No one claims the evidence has to show "one secret meeting in a smoke-filled room," or any number of meetings, nor do all the conspirators have to be present at any one time and sign their names in blood. But a charge of conspiracy must mean something besides a handle on which to hang orders, else we falter too close to thought control.

In my opinion, some kind of overt acts which implement a meeting of the minds, is a "must" in a conspiracy. In a real conspiracy they are not hard to find.

The truth is, the average price-fixer is about as stupid as his aims.

If ostriches really hide their heads in the sand to avoid detection—real price-fixing conspirators outdo the silliest Struthio Camelus on earth.

1343 They use the same old repetitious and obvious ways to maintain concert of purpose—correspondence (let no one tell you price-fixers don't write), trade convention and committee meeting minutes, association records, black lists, white lists, all vulnerable to statements against interest, statements of disgruntled employees, statements of injured competitors, etc.

But if there is no conspiracy but only a fiction on which to base an order against legal acts, confederating evidence will be vague. Because it is difficult to find? No, because it isn't there.

Such is the state of affairs in this case. After the governmental NRA public hearings of 1933 and 1934, there is no evidence that could be seriously slanted to conspiracy. What is relied upon is interesting principally because it demonstrates the quality of evidence on which the Commission bases its findings. For instance, there is direct and uncontroverted testimony that four years after the NRA (in the year 1937) an official of Eagle-Picher ate lunch with a couple of men from National at their club. Backing up

this astonishing (?) evidence of intrigue are further facts, such as, three years later (in 1940) Eagle-Picher was caught red-handed with a copy of National Lead Company's price list in its files. (It should have hid it in a pumpkin.)

After reciting these "evidences" of conspiracy, the findings of fact concludes there were "Various other instances of similar cooperation between these two competitors * * *".

To which I can only ask, "What instances and what cooperation?"

I doubt a reviewing court will be receptive to a finding of conspiracy on such nonsense. As for myself, I'll not play Othello to the prosecution's Iago on such a silly pretext as Picher's price list being found in National's drawers.

Advering to the sign post of a general aim (and its vehicle) for the alleged conspiracy in restraint of trade—one of the specific vehicles to carry out this restraint is tied to the alleged conspiratorial adoption and concerted maintenance of a common price-fixing factor, namely, the planned common use of zone differentials for the averaging of freight charges. Another vehicle is the alleged conspiratorial agreement to use agency methods of selling where distributors were consigned stocks for resale at terms collusively agreed upon by the defendants. Besides these, there are collateral references made to usual 1344 and ordinary trade customs followed in all industries, with the inference drawn that these trade customs were concertedly agreed upon. I know of no industry engaged in the distribution of any homogeneous products that does not universally and consciously follow a historic pattern grown up in its own trade, dealing with cash discounts, terms of delivery, duration of supply contracts, the use of similar types of containers, with reference to size, weights or amounts,[15] as well as customary methods of billing, shipping, etc.

As to the first vehicle—zone methods had been used by National since 1910, but in 1933 National worked out for its own use a pictorial map of its zones and the differentials it would charge its customers. This method of aver-

15. Simple examples are: Beer is sold in bottles or barrels; cement in bags or carloads; apples in bushel baskets; oranges in crates—all consciously parallel. The same is even more obvious in the similarity of credit and cash terms in any one trade as well as the particular buying and selling seasons prevalent in specific industries.

aging freight costs was consciously followed by others, though not all.

As for the second vehicle—conscious parallelism in the use of agency methods—National Lead began using agencies in December, 1932. Eagle-Picher used them in 1933, and Glidden followed the same method six years later, but shortly after discarded them. Sherwin-Williams never used the agency plan at all, while National abandoned it in 1944.

Thus we have as the two alleged central themes or vehicles to carry out the alleged conspiracy, substantially similar factors used in quoting prices, and a substantially similar agency factor.

One of the factors was adopted by one company in 1910, by some of the others in 1933, and by another never at all.

One defendant adopted the second factor in 1932, another in 1933, another in 1939 (but dropped it in 1942), another never utilized it at all. To say the least, this is a lackadaisical conspiracy, with acts you could hardly call contemporaneous.

With the same kind of a timetable, the Boston Tea Party would have been held when Cornwallis was surrendering to George Washington. Macbeth would have sunk the dagger into the King after Birnam Wood had already removed to Dunsinane, and Guy Fawkes would never have seen the basement of Parliament at all.

Another sign post is the presence of "enforcers." Most conspiracies have weak sisters, who must be cajoled or browbeaten into line. Syphax had no stomach for deserting Cato when other Roman Senators sought to deliver Cato into Caesar's hands. It took Sempronius to keep him in line.

Even that bloody old rascal, Macbeth, turned out to be a Caspar Milquetoast at heart and nearly flunked the murder of the King. If it hadn't been for his Lady, he would never have got any further than Thane of Cawdor.

Whether it be the Blackdot of Blind Beggar Pew, or the knife of Long John Silver, in the world of pirates, or whether it be punitive basing points, fighting brands, black lists or association penalties, in the world of commerce—threats, force, intimidation, or things of such ilk are important sign posts along the conspiracy road.

For every "gentlemanly understanding" and "suave unexpressed agreements of sales managers" to fix prices,

there will be twice as many eager beavers gnawing the legs off their competitor's share of the market. And it takes more than a "friendly Scotch and soda" to stop them. Some kind of an "enforcer" comes into play.[16]

1346 I have yet to read the record in a real price-fixing conspiracy where "enforcers" (and their methods to hold the laggards in line) were not part and parcel of the case.

We have no enforcers here.

There are no such sign posts in this record.

The prosecution claims this is because the conspirators, having once discussed zones and agencies in 1933 under NRA, no longer needed to consort and confederate. To accept such an argument belies the Commission's label of expertness. The truth is, unless a price-fixing agreement is armed by an "enforcer" with some private punitive method at hand, the conspiracy lasts no longer than it takes a sales manager to get to the phone to whisper his own private price cut. And this isn't from one to twenty years.

To the fool who subscribes, the glitter in any price-fixing scheme is the hope that all competitors will follow it, but himself.

Added to the lack of conspiratorial sign posts (secrecy, specific vehicles to carry out a general aim, enforcers, etc.) is the uncontradicted testimony of officials[17] that there were never any agreements or understandings by their respective companies with other respondents or with any competitors as to prices, terms, or selling methods.

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16. The common garden variety of enforcers are:
Punitive basing points—*Cement* case, 333 U. S. 683.
Kangaroo court to prescribe rules and punish violators—*Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457.
Policing of job requirements—Count I of *Rigid Steel Conduit* case, 168 F. 2d 175.
Requiring advance notice of price changes—*U. S. Maltsters Assn. et al.*, 152 F. 2d 161.
Requiring suppliers to follow white lists—*Wholesale Dry Goods Institute, Inc.*, 139 F. 2d 230.
Prevention of diversions in transit—*American Iron & Steel Institute*, Docket 5508.
Blacklisting—*Arkansas Wholesale Grocers Assn.*, 18 F. 2d 866.
Reporting of price cutters—*Beechnut Packing Co.*, 257 U. S. 150.
Boycott—*Chamber of Commerce of Minneapolis*, 13 F. 2d 673.
Espionage—*Special Accounting Supply Mfgrs. Assn.*, 35 F. T. C. 430.
Issuance of private "certificates of necessity"—*Building Material Dealers Alliance*, 26 F. T. C. 142.

17. Wormser (Lead Industries Association), McCarthy (National Lead), Sprague (Glidden), Bowlby (Eagle-Picher) and Brown (Sherwin-Williams).

Without proof of conspiracy, the question naturally arises, why was complaint filed, the case tried and an order entered?

In my opinion, the complaint was filed and the case stands or falls on the concurrent knowledge of defendants that the substantial price similarity of their lead pigments was arrived at by substantially similar pricing factors—in short—"conscious parallelism."

For over two decades economic theorists have sought ways to condemn conscious parallelism. The old Federal Trade Commission originated this crusade in the early 1940's and filed numerous complaints accusing defendants with charging prices for their goods with knowledge
1347 that others charged the same price. The first order against conscious parallelism to reach the court was *Federal Trade Commission* v. *Rigid Conduit.*[18] The Circuit Court of Appeals sustained the order and the Supreme Court refused to reverse on a tie vote. However, the decision was a pyrrhic victory, for congressional and public clamor against this decision was so strong that no court proceeding has ever been initiated to enforce it. Until now, all subsequent disposition of cases where conscious parallelism was alleged in the complaint have carefully avoided the type of order issued in *Rigid Conduit.*[19]

But now conscious parallelism again raises its bureaucratic head in this and a companion case,[20] tentatively and collaterally, but not directly, for the instant cases do not find conscious parallelism illegal in their findings of fact, but prohibit it in the orders to cease and desist. The order is justified on what I call a spiral rationale, circular in motion but not coming out where it started:

1. Conscious parallelism is not of itself illegal;
2. But evidence of conscious price parallelism may give the Commission the power to imply conspiracy;
3. Conspiracy is illegal;
4. With a finding of conspiracy, the Commission assumes the power to prevent its continuation by prohibiting conscious price parallelism;
5. Conscious parallelism is illegal.

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18. *Triangle Conduit and Cable Company* v. *Federal Trade Commission*, 168 F. 2d 175 (7th Cir. 1948), aff'd sub nom *Clayton Mark Co.* v. *Federal Trade Commission*, 336 U. S. 956 (1949).

19. *Clay Products Association, Inc.*, Docket 5483; *Clay Sewer Pipe Association, Inc.*, Docket 5484.

20. *Chain Institute, Inc., et al.*, Docket 4878.

Ignoring for the moment the impracticality of carrying out an order against conscious parallelism, and casting aside the question as to whether the Federal Trade Commission is endowed with such complete equity court powers, let us see if there are sounder ways of testing the economic validity of conscious parallelism than all this legalistic folderol about conspiracies that don't exist.

1348 We need tests which can be applied on a factual basis.

At the same time the Commission originated its drive against conscious parallelism as the enemy of free enterprise, a more realistic concept of competition was being developed by economists which held where even if pricing formulas were known and substantially paralleled (as here), "the significant test was to look for the independence and competitiveness of the rivals."[21]

Workable competition, as developed by Professor J. M. Clark, Dean Edward S. Mason and the late Professor Joseph A. Schumpeter, as well as Professors E. P. Lernerd, M. P. McNair and F. S. Teele, placed the emphasis on the longer range aspects of a progressive economy; not on an assumed unchanged equilibrium of demand and supply, but on changes which included population growth, the discovery of natural resources, developments in technology, advances in the art of management, and many others. Stress was laid on the constructive role of entrepreneurs in expanding demand and improving products. National brand advertising was something more than an effort to insulate against the price raids of competitors. It recognized that the businessman often made investments of time and money ahead of current demands. Under the doctrine of workable competition, large business units may have put more competitive pressure on small units than was desirable, but every injury to a small competitor was not necessarily an injury to competition. Competition in a growing economy was bound to put pressure on inefficient competitors, whatever their size.

Some tests under the theory of dynamic workable competition can be well applied to the case at hand. I have lifted these tests bodily from Professor Meriam's thesis and attempted to apply them to the facts in the instant case.

As for the facts, there is no reason to lose the crux of

21. R. H. Meriam's "Bigness in the Economic Analysis of Competition," Harvard Business Review, March 1950.

this case in long histories of the defendants, any one of which would fill a volume. The principal defendants are National Lead, Eagle-Picher, Glidden, Sherwin-Williams, and International Smelting and Refining Company.

The products involved are different kinds of pigments made from lead. Defendants are engaged in other fields of commerce where they may be better situated, but in the lead pigment industry, National is by far and above the important producer and distributor. It was and is, 1349 in the parlance of the trade, the price leader. Its national advertised brand has developed a large public acceptance. National sold 58.8 per cent of the total market in 1938. It was the Kilroy of the lead pigment industry. No matter where a competitor opened up a new plant, National was already there with a production point serving that market area. It owned more production points than all of the other defendants put together.

No matter what you call them, lead pigments are lead pigments. The cost of the raw material that goes in them, the cost of packaging and shipping are substantially similar. Moreover, all manufacturers are consciously aware of the fact that their cost and selling prices are substantially similar to each other. That is to say, the prices of lead pigments in Bull Hook, Montana, are substantially similar to one another in that town, and the prices in New York City are substantially similar to each other in New York.

This, the Commission contends, is conspiracy.

Serious students of workable competition have a less dramatic but, I believe, a more considered answer to the problem. Their answer does not lend itself to cliche thinking. In fact, it requires a working knowledge of the industry in question and a weighing of several economic facts, all at one and the same time.

Though National called the tune on its own prices, there were legal and competitive directions it could not ignore. Handling hundreds of items in an unlimited range of quantities and qualities, with innumerable delivery costs involving not only freight cartage but different packaging charges, it could not let its salesmen free-lance on its price quotations. It had to follow, if it would live, a pricing formula and hope that the formula did not present a big enough error to lay the company open to a Robinson-Patman Act charge of price discrimination (a hope that was not fulfilled).

Whether National liked it or not, the differentials between their raw material cost and what they received for finished lead pigments were not only shrunk by their competition's desire for a greater percentage of the market, but also by the clamor of lithopone, titanium oxide, zinc oxide, and leaded zinc oxide to take over the same market.

These rival commodities are produced in large volume by strong competitors (not parties to this suit).

1350 Under these conditions, any conspiracy by the lead pigment manufacturers to fix prices would have been a bootless venture.

Eagle-Picher, next to National in importance, with four production points, produced approximately one-third as much lead pigments as National. Glidden with three, and Sherwin-Williams with one production point, while strong in the ready-mix paint business, were relatively negligible factors in the production and sale of lead pigments, their interests being mostly in mixing and selling their own paints.

Anaconda never engaged in lead pigments but in 1936 was acquired by International Smelting and Refining, who permanently suspended its lead pigment business in 1946. There is no reason to believe that it will ever reenter the business of the manufacture and sale of lead pigments.

Lead pigments are made from lead. In fine, there is so much lead in lead pigments that the cost of the raw material determines within a few cents the price of the finished product. The price of raw lead is the same for everybody in any place in the United States.

To this structure we must add another layer of verities. Lead is heavy. No matter where it is dug out of the ground, those who control the price of lead (a phenomenon not under attack in this case) see to it that prices are quoted f.o.b. New York. Raw lead costs all defendants the New York price plus what it takes to haul it to their plants.

This is the famous basing point system of pricing (also not under attack in this case). It is the grandfather of all systems—multiple basing points, zone systems, warehouse shipping points, and a host of variations. It is amoral in itself—there is nothing good or bad about it.

It is the use of basing points (or its offspring) as factors to fix conspiratorial prices[22] that has been condemned by the courts.

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22. See *Federal Trade Commission* v. *Cement Institute*, Nos. 23-34, October Term, 1947.

The same can be said of zone pricing. When zones are used by concerns who have only one point of production and lack the financial strength to maintain distributive
1351 outlets of their own, it is an effective individual means of instantly meeting the price of their biggest rivals who own plants and warehouses all over the country.

In the instant case where one company had production points spread all over the country and held its selling price at a small margin above raw material cost, price followers with one or a few scattered plants found it not only inconvenient but impossible to do other than to consciously stay within price ranges similar to the leader in each locality.

There is no controversy over this business fact. The defendants, while not all utilizing the same methods of computing prices, followed some price structure which came out with either substantially similar prices or at least followed in a tandem arrangement a price that was consciously and uniformly below. For the most part the companies making lesser known products tagged a respectful 25¢ per cwt. behind National's and Eagle-Picher's advertised brands. Their actions were undoubtedly consciously parallel.

If conscious parallelism be a crime, it is an offense that pervades our entire protoplasmic system, from the amoeba in the Dismal Swamp to the most esoteric Government agency in Washington. It is as much a part of the highest attainments of humanity as it is of the lowest and most despicable forms of vice. To say that one who practices it belongs at either end of the scale is to deny its universality. To condemn it is like condemning the tide.

To determine whether the prohibition of conscious parallelism sans conspiracy comports with sound economic principles in the instant case, the following conclusions are reached.

The evidence shows the general uniformity of price movements in lead pigments lags close behind the movement of its raw material cost. There is a leveling of the peaks and lows by averaging gains against losses in inventory.

The evidence shows price changes are initiated in no regular pattern. The price leader is National Lead in most cases, and its price changes are followed generally. The evidence shows a changing division of the market amongst the various competitors with the principal producer, Na-

tional Lead, losing its former higher percentage of the total share of the market.

The evidence shows individual companies explore the possibility of increasing or decreasing their positions
1352 in a particular part of the industry, either geographically or by product, as determined by their own views on profit possibilities.

The evidence shows the various defendants in the lead pigments industry act independently on investing in processes or using new manufacturing techniques.

The evidence shows the industry does not function to hold an umbrella over the inefficient as is witnessed by the mortality of many old companies and the entrance of new companies and new competitive commodities in the same market.

The evidence shows that the members of the industry cannot adapt themselves to a status quo because the entrance of new countervailing products affords no condition favorable to stagnation.

The evidence shows that constant and active participation in technological progress, production improvement, expansion of markets, and output and capacity are present.

As to the final test on price quotations and pricing formulas—the evidence shows that National's position as the price leader makes price comparison easier for buyers, but conversely, no system of price quotations can make the price comparison easier for buyers without also making it easier for the sellers. Hence the question must be posed in terms of the actual price behavior of the industry. Because the price of lead pigments is so closely affected by the price of raw lead, the price leader cannot avoid price reductions or price raises.

The evidence shows most price followers have consistently charged less than the nationally accepted brands, and have neither feared nor been deterred by the threat of retaliation for they have cut into the price leader's share of total market.

In a free enterprise economy, new or smaller entrepreneurs have three choices in their use of prices as a means to enter or enlarge their share of a market. They may price above, meet or price below their rivals.

From the business facts in this case it is evident National's competitors have only two choices—to meet or bid below. Under the present order the opportunity for exer-

cise of private judgment in pricing their wares is cut in half.[23]

1353 They may not meet.

They may only bid below National.

In the last analysis, this gives them no choice. It puts those who aspire to supplant the leader in a sort of second class business citizenship.

To condemn conscious parallelism sans conspiracy is to disarm the smaller competitor in his already handicapped battle against multiple-point producers.

I am against it.

Lowell B. Mason,
Commissioner.

As to the Commission's order pertaining to price discrimination, I concur.

Lowell B. Mason,
Commissioner.

1354 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5253) * *

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn
Albert A. Carretta.

ORDER CORRECTING PARAGRAPH FOUR (d) OF FINDINGS AS TO THE FACTS.

Whereas, the third sentence of Paragraph Four (d) of the findings as to the facts in this proceeding reads as follows:

"Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and titanium which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for

23. "Do forthwith cease and desist from quoting or selling lead pigments * * * in accordance with a zone delivered price system * * * with the effect of systematically *matching* the delivered price quotations or the delivered prices of other sellers of lead pigments * * *."

processing, packaging and shipping, with certain variations between different size packages."; and

Whereas, said sentence contains a typographical error in that the word "titanium" therein should have been "turpentine":

1355 Now, Therefore, It Is Ordered that the third sentence of Paragraph Four (d) of the findings as to the facts issued in this proceeding on January 12, 1953 be, and it hereby is, corrected to read as follows:

"Under the terms of the new contract duPont was to furnish National corroding pig lead, linseed oil and turpentine which National was to convert into white lead-in-oil to the amount of duPont's total requirements and package and ship the same to duPont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages."

By the Commission.

D. C. Daniel,
Secretary.

Issued: February 4, 1953.

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

National Lead Company, *Petitioner,* *against* Federal Trade Commission, *Respondent.*	10839.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 12, 1953.)

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes your petitioner, National Lead Company, by its attorneys, and presents its petition to review and set aside the order of the Federal Trade Commission (herein-

after referred to as the "Commission") issued January 12, 1953 and served on January 15, 1953, and in support thereof, respectfully states and shows:

1. National Lead Company is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business located in the City of New York, State of New York

Nature of the Proceedings.

2. On November 25, 1944 the Commission issued and subsequently served its complaint in a proceeding entitled "In the Matter of National Lead Company, et al", Commission Docket No. 5253, charging petitioner and the other respondents named therein with the use of unfair methods of competition in commerce in the sale of white lead in violation of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and with having discriminated in price in the sale of white lead in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (Title 15, United States Code, Section 13). In addition to petitioner, six other corporations were named as respondents in said complaint.

3. After the filing of respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a Hearing Examiner of the Commission. Subsequently, on April 12, 1946, the Commission issued and thereafter served upon the same respondents an amended complaint charging petitioner and the other respondents with the use of unfair methods of competition in commerce in the sale of various lead pigments in violation of the provisions of Section 5 of the Federal Trade Commission Act and with having discriminated in price in the sale of various lead pigment in violation of the provisions of subsection (a) of Section 2 of the Clayton Act.

The Amended Complaint.

4. Count I of the amended complaint charged petitioner with having monopolized and attempted to monopolize the interstate sale of lead pigments, with having acted unlawfully to secure a monopolistic control over the prices of lead pigments, with having conspired with the other respondents to eliminate price competition in the sale of lead pigments,

and with having entered into contracts and understandings with E. I. duPont de Nemours & Company, Inc. for the purpose and effect of promoting maintenance of prices of white lead fixed by petitioner and other sellers. Count I further charged that petitioner and the other respondents in connection with the sale of lead pigments agreed to adopt and adopted a system of delivered price quotations which prevented reflection of differences in the costs of delivery from the respective manufacturing plants of the respondents; agreed to adopt and adopted a zone delivered price system; agreed to secure and secured the cooperation of the Lead Industries Association in fixing and adopting non-competitive terms and conditions of sale; exchanged directly and through the office of the Lead Industries Association price factors and information concerning price factors; agreed to adopt and adopted consignment or agency agreements for the purpose of preventing dealers from selling lead pigments at lower prices; and agreed to fix and fixed prices, terms and conditions of sale.

5. Count II of the amended complaint charged each of the respondents with having discriminated in price in the sale of lead pigments with respect to competing purchasers in any one zone, and competing purchasers in different zones, and with having discriminated in price in the sale of lead pigments as the result of certain quantity, trade and regional discounts.

Answer of Petitioner.

6. Petitioner duly filed its answer to the amended complaint, denying all material allegations thereof charging unfair methods of competition and discriminations in price in the sale of lead pigments.

Hearing Before Trial Examiner.

7. Thereafter further testimony and other evidence in support of and in opposition to the allegations of the amended complaint were introduced before a substituted Hearing Examiner, it having been stipulated by counsel for all parties that the testimony and other evidence theretofore received in support of the original complaint, with certain exceptions, might be considered as a part of the record under the amended complaint.

8. The Trial Examiner's Recommended Decision was

filed on March 31, 1948. Thereafter, counsel for the Commission, counsel for petitioner and counsel for the other respondents filed exceptions to the Trial Examiner's Recommended Decision and the matters came on for oral argument before the Commission on May 19 and 20, 1949. Thereafter, on motion of the Commission, a second argument on the merits was had on February 1 and 2, 1950. On January 12, 1953 the Commission issued orders sustaining in part and denying in part the exceptions theretofore filed by the Commission's counsel and the exceptions theretofore filed by counsel for petitioner and counsel for the other respondents.

The Order to be Reviewed.

9. On January 12, 1953 the Commission made and thereafter on January 15, 1953 served on the petitioner its "Findings as to the Facts and Conclusion" and its "Order to Cease and Desist". A copy of the "Order to Cease and Desist" is attached hereto as Exhibit A. At the same time there were issued by the Commission and served upon the petitioner the "Opinion of the Commission" and the "Dissenting Opinion of Commissioner Lowell B. Mason."

10. The "Order to Cease and Desist" orders the petitioner and the other respondents to forthwith cease and desist from entering into or continuing any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of the respondents, or between any respondents or any other party, to do or perform any of the following acts or things:

"1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves."

11. Said "Order to Cease and Desist" further provides that petitioner and each of the other respondents "do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

12. Said "Order to Cease and Desist" further orders petitioner and each of the other respondents to cease and desist from discriminating in the price of lead pigments:

"1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost

of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein."

13. Said "Order to Cease and Desist" further provides that petitioner "do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.".

Jurisdiction and Venue.

14. This Court has jurisdiction and venue under Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and Section 11 of the Clayton Act, as amended (Title 15, United States Code, Section 21).

Said Section 5 of the Federal Trade Commission Act provides in subdivision (c) thereof, in part:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon

the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission; * * *."

Said Section 11 of the Clayton Act, as amended, provides in part:

"* * * the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, * * *.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside."

15. Your petitioner regularly carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act, in that it is regularly engaged in the sale of lead pigments and other products to purchasers in this Circuit. In addition, your petitioner is required by said order of the Commission to cease and desist from continuing to use in this Circuit certain acts and practices in the sale of lead pigments in interstate commerce.

Relief Prayed.

Your petitioner therefore prays:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.

2. That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said findings, said conclusion and said order.

3. That this Court grant such other and further relief as this Court may deem proper.

Points on Which Petitioner Intends to Rely.

Petitioner intends to rely on the following points:

(a) The Commission's findings as to the facts are not supported by the evidence.

(b) The Commission's findings as to the facts are insufficient as a matter of law to support the "Order to Cease and Desist".

(c) The "Order to Cease and Desist" prohibits acts, practices and methods of competition which the Commission has no power, authority or jurisdiction to prohibit.

(d) The Commission's findings as to the alleged conspiracy in the sale of lead pigments are not supported by the evidence.

(e) The Commission has neither the power nor the authority to prohibit the petitioner from selling lead pigments in accordance with a zone delivered price method of sale.

(f) The right of each respondent to employ its own zone delivered price method of sale was not an issue raised by the allegations of the amended complaint.

(g) The Commission's findings as to the alleged illegal discriminations in price charged by the petitioner in the sale of lead pigments are not supported by the evidence.

(h) The conclusion that certain of petitioner's prices for lead pigments constitute illegal discrimnations in price is contrary to law.

(i) The Commission has neiter the power nor the authority to prohibit the petitioner from acquiring or attempting to acquire any interest of ownership or control in the capital stock or physical assets of any competitor in the manufacture, sale or distribution of lead pigments.

Dated: March 11, 1953.

Alexander & Green,
120 Broadway,
New York 5, N. Y.,
By James D. Ewing,
A Member of said Firm,
Attorneys for Petitioner,
National Lead Company.

Mayer, Meyer, Austrian & Platt,
231 South La Salle Street,
Chicago 4, Illinois,
of Counsel.

Exhibit A.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

In the Matter of:

National Lead Company,
a corporation,
Eagle-Picher Lead Company,
a corporation,
Eagle-Picher Sales Company,
a corporation,
Anaconda Copper Mining Company,
a corporation,
International Smelting & Refining
Company, a corporation,
The Sherwin-Williams Company,
a corporation, and
The Glidden Company,
a corporation.

} Docket No. 5253.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Com-

mission having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employes, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone

delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It Is Further Ordered that the respondent, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

The Sherwin-Williams Company,
Petitioner,
against
Federal Trade Commission,
Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 12, 1953.)

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

I.

The Sherwin-Williams Company, petitioner, respectfully represents that it is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal office in the City of Cleveland, Ohio; that it is duly authorized to do business in the State of Illinois where it maintains a factory and sales offices for the manufacture and sale of paint, varnish and lacquer products and where it formerly manufactured basic lead pigment products; that it is and was regularly engaged in the sale of such products to purchasers in this circuit and that the methods of selling and other acts carried on or alleged to have been carried on by this petitioner, which are the subject of a "Complaint" and "Cease and Desist Order" issued by the Federal Trade Commission, are within the jurisdiction and venue of this Court.

II.

On November 25, 1944, respondent, Federal Trade Commission, in a proceeding entitled "In the Matter of National Lead Company, *et al.*," Docket No. 5253, issued its complaint against your petitioner and that after the filing of petitioner's answer thereto, on April 12, 1946, the Commission issued its amended complaint against your petitioner, in which complaint it was alleged:

(1) That your petitioner, along with others, engaged in a nation-wide conspiracy among certain lead pigment producers to manipulate and control the prices, terms and conditions under which lead pigments are sold throughout the entire United States, in commerce, by using unfair and discriminatory acts and methods of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45).

(2) That your petitioner engaged in systematic discrimination in prices it charged or that it received from its customers in connection with its sale of lead pigments in commerce, in violation of the provisions of Section 2(a) of the Clayton Act, as amended (Title 15, United States Code, Section 13, as amended).

III.

Thereafter your petitioner filed its answer to the said amended complaint issued against it, by which answer your petitioner admitted it was engaged in the manufacture of lead pigment products, denied that it conspired with or rendered assistance to other respondents or with the Lead Industries Association for the purpose of eliminating price competition, explained that most of its production was not sold but used in the manufacture of paints and that while the total production of combined respondents was substantial, your petitioner's sales were a small and negligible part of the total. Your petitioner denied selling according to the zone method depicted by the Commission and explained its system of pricing to be the result of its own individual course of action. Your petitioner denied stipulating or controlling resale prices, denied unlawful conspiracy to set container differentials, denied ever selling lead pigments on a consignment or agency basis as alleged by the Commission or ever selling to battery manufacturing groups, denied that it had any inherent advantages or that it surrendered inherent advantages to other competitor manufacturers and denied all the material allegations of the complaint charging unfair acts or methods of competition in the sale of lead pigments.

Further, your petitioner denied discriminating between its customers as to prices for lead pigments and explained its classification of customers and differentials in prices to them as having no appreciable effect on commerce so as to be discriminatory under the Clayton Act.

IV.

Subsequently, the Federal Trade Commission held hearings before a trial examiner appointed by the Commission, and received testimony in support of the complaint and in opposition to it, which testimony so taken was reduced to writing and filed in the office of the Federal Trade Commission.

V.

On March 31, 1948, the Trial Examiner of the Federal Trade Commission made and filed his "Trial Examiner's Recommended Decision" in the proceeding, copy of which recommended decision was served upon the petitioner; that thereafter your petitioner filed with the Federal Trade Commission its exceptions to the "Trial Examiner's Recommended Decision"; that thereafter briefs were filed with the Commission in the proceeding by the attorney for the Federal Trade Commission and by the attorney for the petitioner; that thereafter the cause came on for oral argument on May 19 and 20, 1949, and again on February 1 and 2, 1950 before the Commission and following such argument was taken under submission by the Commission.

VI.

Thereafter, on January 12, 1953, the Commission issued in this proceeding a "Finding as to the Facts and Conclusions," an "Order to Cease and Desist" and an Opinion of the Commission together with a Dissenting Opinion.

The order directed against the petitioner is in the following words:

> "It is ordered that the respondent, The Sherwin-Williams Company, its respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealer's price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that the respondent, The Sherwin-Williams Company, its officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any

advantage in price in dealing with one or more sellers as against another.

It is further ordered that each of said respondents, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as 'commerce' is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is further ordered that the respondent, The Sherwin-Williams Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order."

VII.

a. The Federal Trade Commission had no basis for concluding that there is or was any combination, conspiracy or agreement between petitioner and others to control prices of lead pigments for the reason that the evidence fails to substantiate such a finding; or in concluding that petitioner sold lead pigments in accordance with a plan or zone system to eliminate competition for the reason that

the proof failed to establish such a practice; or in ordering petitioner not to sell lead pigments on agency or consignment contract so as to control resale prices where petitioner never sold lead pigments under agency or consignment plan; or in concluding that petitioner carried out any planned course of action to perform any act in violation of the Federal Trade Commission Act.

b. Further, the Commission had no basis for concluding that the petitioner discriminated in the prices of lead pigments to its customers in "commerce" as defined in the Clayton Act for the reason that there has not been shown a substantial lessening of competition; or that petitioner sold at prices in violation of said Clayton Act and not at prices in good faith to meet competition, which practice is not illegal.

c. In said proceeding before the Federal Trade Commission there was no proof showing or tending to show that your petitioner has committed any act or acts, or engaged in any practice or practices prohibited by the provisions of Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, or warranting the issue by the Commission of its "Order to Cease and Desist."

VIII.

The "Findings as to the Facts" of the Commission are not supported by the evidence and are insufficient as a matter of law to support the "Conclusion" or the "Order to Cease and Desist," which "Order" prohibits acts, practices and methods of doing business which the Commission has no authority or power to prohibit and the Federal Trade Commission, in this case, was without authority or jurisdiction to enter any order with respect to your petitioner.

IX.

Wherefore, your petitioner prays:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.

2. That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said findings, said conclusion and said order.

3. That this Court grant such other and further relief as this Court may deem proper.

Dated March 10, 1953.

T. J. McDowell,
J. T. Van Keuls,
Mayer, Meyer, Austrian & Platt,
Attorneys for The Sherwin-Williams Company, Petitioner.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

The Eagle-Picher Company and The Eagle-Picher Sales Company, *Petitioners,* *against* Federal Trade Commission, *Respondent.*	Appeal No. 10841.

PETITION FOR REVIEW.

(Filed March 13, 1953. Kenneth J. Carrick, Clerk.)

Now come petitioners, by their counsel, and respectfully petition this Court to review and set aside an Order to Cease and Desist which respondent issued against petitioners on January 12, 1953. A copy of said Order to Cease and Desist is hereto attached and marked Exhibit "A".

1. The Eagle-Picher Company is an Ohio corporation having its principal place of business at Cincinnati, Ohio, and is the same corporation as the Eagle-Picher Lead Company which is referred to in the attached Order to Cease and Desist. The Eagle-Picher Sales Company is a Delaware corporation, a wholly owned subsidiary of The Eagle-Picher Company, and has its principal place of business at Cincinnati, Ohio. The Federal Trade Commission is a lawfully constituted Government agency which has its principal office in Washington, D. C.

2. On November 25, 1944, respondent issued a com-

plaint and on April 12, 1946, an amended complaint, each charging petitioners and the other corporations identified in the attached Order to Cease and Desist with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in the sale and distribution of lead pigments, in violation of the provisions of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45). Respondent also charged petitioners with unlawful price discrimination in the sale of lead pigments, in violation of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15, United States Code, Section 13, as amended).

3. After due procedure, as provided by law, the respondent made formal written findings that petitioners and the other corporations identified in the attached Order to Cease and Desist had violated the Federal Trade Commission Act by forming and continuing a conspiracy in retraint of trade in relation to pricing and selling lead pigments, and that said respondents used substantially identical zone systems for each classification of lead pigments in pursuance of said illegal conspiracy. The Commission further found that each corporation identified in the attached Order to Cease and Desist had unlawfully discriminated in price and had thereby violated the Clayton Act, as amended by the Robinson-Patman Act, by the use of said zone systems and by the use of unjustified quantity discounts.

4. Purporting to be acting upon the basis of said findings and upon the basis of the opinions of the Commissioners, respondent issued the attached Order to Cease and Desist which enjoins certain practices which respondent found to be illegal, and enjoins certain other practices which respondent did not find to be illegal.

5. Petitioners conduct businesses which are affected by the Order to Cease and Desist, Exhibit "A", within this Seventh Judicial Circuit, which fact, by the terms of said Federal Trade Commission Act and the said Clayton Act, gives this Court jurisdiction and venue in respect to this petition for review. This Court also has jurisdiction and venue under the Administrative Procedure Act, Section 10 of Chapter 324 of the Act of June 11, 1946 (Title 5, United States Code, Section 45).

6. Wherefore, petitioners pray:

a. For an order of this Court which sets aside the hereto attached Order to Cease and Desist, Exhibit "A", issued by the respondent.

b. For an order of this Court setting aside the provisions of said Order to Cease and Desist which enjoin legal conduct on the part of the petitioners, provided said Order to Cease and Desist is not set aside in its entirety.

c. For an order of this Court which modifies the said Order to Cease and Desist by making clear and specific the acts and courses of business from which petitioners must refrain, provided said Order to Cease and Desist is not set aside in its entirety.

7. The points upon which the petitioners intend to rely in support of this petition for review are as follows:

a. Respondent based its Order to Cease and Desist in part on its finding that there was a continuing conspiracy among petitioners and the other corporations identified in the Order to Cease and Desist, whereas the said finding was not supported by substantial evidence.

b. Respondent based its Order to Cease and Desist in part upon its finding that selling lead pigments at different zone delivered prices to purchasers in competition with one another in different zones might tend substantially to lessen competition among them, whereas said finding was not supported by substantial evidence.

c. Respondent based its Order to Cease and Desist in part upon its finding that quantity discounts used by petitioners in the sale of lead pigments tended substantially to lessen competition among the purchasers, whereas said finding was not supported by substantial evidence.

d. Respondent wrongfully exceeded its lawful power and authority and usurped the power of a court of equity by ordering petitioners to cease and desist from acts, conduct and business practices which were not found to be illegal and are not illegal.

e. As a matter of law, respondent misinterpreted and misapplied the Clayton Act, as amended by the Robinson-Patman Act, and in consequence ordered, in

effect, that petitioners discontinue selling lead pigments on a zone delivered price basis, whereas this business practice is not prohibited by the Act.

f. Acting independently and in good faith, petitioners employed zone delivered prices and quantity discounts to meet the prices of competitors and particularly those of the National Lead Company. Instead of holding that this business policy constituted justification for petitioners' prices under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, respondent wrongfully enjoined petitioners from using any delivered price zone system for meeting competitors' prices, even as a matter of individual policy, as well as by conspiratorial agreement.

g. The respondent indulged in an abuse of discretion as the term is used in the Administrative Procedure Act, by arbitrarily finding a "conspiracy" between petitioners and the other corporations identified in the Order to Cease and Desist. The arbitrary nature of this finding of "conspiracy" is revealed by respondent's companion arbitrary action in enjoining petitioners from meeting competitors' zone prices by independent action, as distinguished from continuing the conspiracy". If respondent had not furtively recognized that petitioners were in truth and in fact following the prices of National Lead Company solely as a matter of independent business judgment, as petitioners' officers testified unequivocally, then this injunction against independent action would have been unnecessary. Respondent arbitrarily adopted "conspiracy" as a legal fiction both to fortify this unlawful injunction and to preclude the enjoined practice from constituting good faith, affirmative justification for petitioners' pricing methods, under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act.

h. The portions of said Order to Cease and Desist which relate to alleged price discriminations are too indefinite to enable petitioners to judge the scope of the injunction or its applicability to many specific pricing practices. It would seem to include within its prohibition many price differences which do not affect competition in fact.

i. The said Order to Cease and Desist is not in the public interest because its consequences may be to force petitioners out of the business of manufacturing

g lead pigments altogether. National Lead is much larger than petitioners, operates e manufacturing plants and hence is low cost of most lead pigments.

cannot underprice National Lead Company d of time and cannot obtain prices over those ead Company. Therefore, if petitioners are n meeting the prices of National Lead Com- f a zone system or otherwise, petitioners can- lead pigments in competition with National y.

Brown, Fox, Blumberg & Markheim,
231 South La Salle Street,
Chicago 4, Illinois,
By Nathan S. Blumberg,
A Member of Said Firm,
Attorneys for Petitioners, The Eagle-Picher Company and The Eagle-Picher Sales Company.

& Evans,
Tower,
, Ohio,
P. Wood,
r of Said Firm,
nsel for Petitioners,
Eagle-Picher Company and
Eagle-Picher Sales Company.

13, 1953.

Exhibit "A".

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:

James M. Mead, Chairman,
Lowell B. Mason,
John Carson,
Stephen J. Spingarn,
Albert A. Carretta.

In the Matter of	
National Lead Company, a corporation, Eagle-Picher Lead Company, a corporation, Eagle-Picher Sales Company, a corporation, Anaconda Copper Mining Company, a corporation, International Smelting & Refining Company, a corporation, The Sherwin-Williams Company, a corporation, and The Glidden Company, a corporation.	Docket No. 5253.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission hav-

ing issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments as prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers

or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products,

either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It Is Further Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

/s/ D. C. Daniel,
Secretary.

(Seal)

Issued: January 12, 1953.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Anaconda Copper Mining Company and International Smelting and Refining Company,

Petitioners,

against

Federal Trade Commission,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Mar. 13, 1953. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Court of Appeals for the Seventh Circuit:

Now come your petitioners, Anaconda Copper Mining Company and International Smelting and Refining Company, and present their petition to review and set aside an order of the Federal Trade Commission (hereinafter sometimes referred to as the "Commission") and in support thereof respectfully show:

1. At all times hereinafter mentioned, petitioners were, and now are, corporations organized under the laws of the State of Montana. Petitioner International Smelting and Refining Company (hereinafter sometimes referred to as "International") was, and now is, a wholly-owned subsidiary of petitioner Anaconda Copper Mining Company (hereinafter sometimes referred to as "Anaconda"). Respondent is a commission created and established by Section 1 of the Federal Trade Commission Act (38 Stat. 717; 15 U. S. C. A. sec. 41). The Order of the Commission herein sought to be set aside was issued by it in Docket No. 5253 on or about January 12, 1953, and served on petitioners on January 15, 1953, in the proceeding hereinafter described. This petition is filed under, and the jurisdiction of this Court is based on, Section 5 (c) of the said Federal Trade Commission Act, as amended (52 Stat. 111; 15 U. S. C. A. sec. 45 (c) and Section 11 of the Clayton Act, as amended (64 Stat. 1125; 15 U. S. C. A. sec. 21).

2. Petitioner Anaconda has never engaged in the production or sale of any lead pigments and has no intention of engaging in such production or sale. Prior to about September 1946, petitioner International engaged in the production and sale of certain lead pigments, namely, only dry white lead and white lead-in-oil; its production and sale constituted only a small proportion of the total lead pigments produced and sold in the United States. Since that time petitioner International has had no intention of engaging in the production or sale of any lead pigments. On October 1, 1946, it sold the only plant at which these materials were ever manufactured by it.

I.

The Nature of the Proceedings As to Which Review Is Sought.

3. The Order of the Commission herein sought to be set aside was issued in a proceeding begun by the issuance by it of a complaint on or about November 25, 1944. That complaint named as respondents in that proceeding the petitioners herein and National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, The Sherwin-Williams Company and The Glidden Company, all of whom were alleged to be engaged, either directly or indirectly, in the manufacture, sale and distribution of lead pigments in commerce. Petitioners filed their separate answers to that complaint on or about November 13, 1945.

4. The Order of the Commission herein sought to be set aside arises out of an amended complaint issued by the Commission in said proceeding on or about April 12, 1946. That amended complaint named as respondents petitioners herein and the others named in the original complaint in said proceeding. Petitioners filed their separate answers to said amended complaint on or about May 24, 1946.

5. The Commission's amended complaint contained two counts, both relating to the sale of lead pigments in commerce. Count I purported to state a charge under Section 5 of the Federal Trade Commission Act, Count II purported to state a charge under Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Petitioners' answers denied that they had in any way violated the provisions of either statute and that the proceeding was in the

public interest; both answers expressly reserved all rights to object to the amended complaint for lack of jurisdiction.

6. The Commission's amended complaint, in a branch of the proceeding not involving the other respondents therein, charged that respondent National Lead Company in 1891 "embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of lead pigments in commerce." Count I of that complaint also set forth a number of acts, methods and practices alleged to have been engaged in by it in furtherance of and in order to effectuate the purposes of that plan and program.

7. Count I of the Commission's amended complaint also charged that all the respondents in that proceeding, including petitioners herein, had combined, conspired and cooperated for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in prices and terms of sales of lead pigments in commerce. It alleged that the National Lead Company had cooperated with and received assistance and cooperation from the other respondents in doing and performing a number of acts, methods and practices, including agreeing to adopt, adopting and maintaining "a system of delivered price quotations" and "a plan whereby the United States is divided into so-called zones." It further alleged that each respondent quoted to all buyers of the same class located in the same zone the same delivered cost, irrespective of the location of the buyer within the zone. The effects of the adoption, use and maintenance of the zone delivered price system of pricing and other practices referred to were alleged to include "unfair and oppressive discrimination" by depriving some purchasers of the "natural advantage otherwise accruing to them from proximity to the factories of respondents"; "a substantial lessening of competition among respondents in all parts of the United States"; and the fixation and control of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser on a basis having no relation to differences in production, selling and actual transportation costs on particular sales.

8. Count II of the Commission's amended complaint incorporated the allegations of Count I with respect to the use of the zone delivered price system. It charged, among other things, that "systematic discriminations in net prices

against nearby customers and in favor of their more distantly located customers are inherent in the use" of that system "when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents * * * to their respective customers"; and that, when sales are made to customers located at or near the borders of adjoining or contiguous zones, each respondent "charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered costs of lead pigments to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them."

9. Beginning on January 15, 1945, hearings were held and evidence taken from time to time in various parts of the country before trial examiners appointed by the Commission. Subsequent to the issuance of the amended complaint, it was stipulated that the testimony and other evidence theretofore received in support of the original complaint (with certain specified exceptions) might be considered as part of the record under the amended complaint. Presentation of the Commission's evidence was completed on or about January 8, 1947. Evidence on behalf of petitioners herein and their co-respondents was thereafter taken and the hearings concluded on or about November 20, 1947.

10. On or about January 8, 1947, about the time the Commission completed the presentation of its evidence, petitioners moved that the Commission enter an order dismissing the amended complaint as against them. They contended that there was no purpose in continuing the proceeding and placing upon them the burden and expense of further defense since it affirmatively appeared that there was then no sufficient public interest to sustain the amended complaint as to them. In support of said motions, it was shown that petitioner Anaconda had never engaged in the manufacture or sale of lead pigments, the only products referred to in the amended complaint; and that petitioner International had permanently discontinued the manufacture and sale of lead pigments, had so advised the trade and had sold the only plant at which it had manufactured the lead pigments sold by it. On March 6, 1947, the Commission entered an order denying the motions to dismiss.

11. On or about December 26, 1947, petitioners filed

proposed findings and conclusions, together with their reasons therefor. On or about January 3, 1948, counsel supporting the complaint filed his proposed findings and conclusions, together with his reasons therefor, and on or about January 24, 1948 petitioners filed replies thereto. On January 7 and 12, 1948, oral argument with respect thereto was had before the Trial Examiner.

12. The Trial Examiner's Recommended Decision was filed on or about March 31, 1948. On or about May 20, 1948, petitioners and counsel supporting the complaint filed exceptions to various parts of the Trial Examiner's Recommended Decision and to his failure to include proposed findings and conclusions requested by them. On January 12, 1953, the Commission issued orders disposing of those exceptions to the Recommended Decision.

13. On or about July 15, 1948, counsel supporting the complaint filed his brief, and on or about November 12, 1948 petitioners filed their briefs. On May 19 and 20, 1949, oral argument was had before the Commission. On February 1 and 2, 1950, reargument was had before the Commission, its membership having changed since the prior argument.

14. On January 12, 1953, the Commission issued, and on January 15, 1953 served on petitioners, its Findings as to the Facts and Conclusion and its Order to Cease and Desist, which is the Order herein sought to be set aside. With it were filed an opinion by Commissioner James M. Mead, in which Commissioners John Carson and Stephen J. Spingarn concurred, and a dissenting opinion by Commissioner Lowell B. Mason. Commissioner Albert A. Carretta did not participate for the reason that oral argument on the merits had been held prior to his appointment to the Commission.

II.

Facts and Statutes Upon Which Venue Is Based.

15. Venue is based on the following facts and statutes:

(a) The only plant at which petitioner International manufactured the lead pigments sold by it, and from which said lead pigments were shipped, was located at East Chicago, Indiana, in this Circuit. The methods of competition and acts and practices, which the Commission's Order requires petitioners to cease and desist from using, were

allegedly used in this Circuit, and the alleged violations complained of were allegedly committed in this Circuit.

(b) Section 5 (c) of the Federal Trade Commission Act, as amended, provides in part:

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside."

Section 11 of the Clayton Act, as amended, provides in part:

> "* * * the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, * * *
>
> "Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside."

III.

Points on Which Petitioners Intend to Rely.

16. The Commission's Findings as to the Facts and Conclusion (except paragraph (b) thereof) and its Order herein sought to be set aside are, to the prejudice of petitioners, erroneous, without foundation in law or fact, unlawful and exceed the jurisdiction of the Commission. Petitioners' acts and practices were not to the prejudice or injury of the public or of petitioners' competitors, and they did not constitute unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Com-

mission Act or discriminations in price in violation of the provisions of Section 2 (a) of the Clayton Act, as amended. Without limiting the generality of the foregoing, petitioners assign the following errors and intend to rely on the following points:

With Respect to the Order Sought to Be Set Aside:

(a) The Commission's Order is not supported by its purported "Findings as to the Facts and Conclusion."

(b) The Order is unlawful and exceeds the jurisdiction of the Commission under Section 5 of the Federal Trade Commission Act and Section 2 (a) of the Clayton Act in that (1) there is no evidence that petitioners' acts and practices have been, or are or threaten to be to the prejudice or injury of the public or of any of petitioners' competitors or to constitute unfair methods of competition or unfair or deceptive acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act; and (2) there is no evidence that the effect of the differences in price to different purchasers of lead pigments has been, or are or threaten to be substantially to lessen competition, or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such difference in price, or with customers of either of them.

(c) The Order is unlawful and exceeds the jurisdiction of the Commission in that it imposes restrictions on petitioners' respective "officers, agents, representatives and employees" who were not parties to the proceeding before it.

(d) The Order is unlawful and exceeds the jurisdiction of the Commission in that it abridges and nullifies petitioners' right to meet competition and unlawfully usurps the legislative functions and powers of Congress by limiting and proscribing beyond the Commission's power the methods of competition which petitioners may employ, and enjoins, proscribes and fetters petitioners' right to engage in free and fair competition. Without limiting the foregoing:

(1) The third ordering paragraph is unlawful and exceeds the jurisdiction of the Commission in so far as it prohibits each petitioner, individually and in the absence of concerted action, "from quoting or selling

lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations of the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

(2) The fourth ordering paragraph is unlawful and exceeds the jurisdiction of the Commission in so far as it prohibits each petitioner, individually and in the absence of concerted action, from selling at different prices without regard to the effects of such differences or to whether such differences may be justified under the provisions of Section 2 (a) of the Clayton Act.

(e) The Order is unlawful and exceeds the jurisdiction of the Commission in that there is no evidence that petitioners entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or threatened so to do, with respect to doing or performing any of the things prohibited in subparagraphs 1 through 6 of the first ordering paragraph of the Order.

(f) The Order is unlawful and exceeds the jurisdiction of the Commission in that it enjoins methods of competition and acts and practices which are not specified in the amended complaint and are not within the issues raised by the pleadings.

(g) The Order is unlawful and exceeds the jurisdiction of the Commission in that it is so vague and indefinite as not to provide or constitute a standard of conduct by which petitioners can reasonably be expected to be governed in the conduct of their affairs.

With Respect to the Commission's "Findings As to the Facts".

(h) The purported "Findings as to the Facts" are erroneous and not supported by the evidence, are improper in form and substance, and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of findings of facts provided for by law and upon

which any order herein may be based in that, among other things:

(1) The Commission has failed to consider and to make findings of fact as to all of the evidence that is material to all of the issues and has considered and made its findings based on only a small part of the evidence and has ignored and has made no findings based on large quantities of direct and uncontradicted evidence, in support of petitioners' position, which met, explained, contradicted or otherwise related to the evidence presented by the Commission.

(2) The extensive quotations of, excerpts from and references to testimony and exhibits are incomplete, misleading and do not fairly represent or characterize the evidence.

(3) Vague, ambiguous and misleading characterizations have been employed to raise implications and inferences not only not warranted or supported by the evidence, but directly contrary to the evidence.

(4) The Commission erred in giving any consideration or weight to or making any findings as to a large quantity of evidence relating to activities pursuant to or arising out of the National Industrial Recovery Act, the preparation and administration of or activities relating to the NRA Code, or action by the Code Authority and other matters connected with or arising out of NRA, on the ground that such evidence furnishes no support for any finding or inference as to any issue in this case.

(i) The finding, in the preamble to the Findings as to the Facts, that the "proceeding is in the interest of the public" is erroneous and not supported by the evidence.

(j) The Commission erred, in making its Findings as to the Facts, in treating both petitioners as one entity and in disregarding their separate, distinct and independent identities and operations, and such findings are erroneous, are not supported by the evidence, and are contrary to law. Without limiting the foregoing:

(1) The findings, in Paragraph One (c), that "The principal officers of respondents Anaconda and International have always been the same"; that "respondent International and the former Anaconda Lead Products Company were in fact mere operating divi-

pondent Anaconda, with no substantial
tity of their own"; and that "All of the
ndent International, of Anaconda Lead
npany, and of Anaconda Sales Company
these findings were for and in behalf of
naconda and such acts will hereafter be
ne acts of respondent Anaconda," are
l not supported by the evidence.

ractice, in the Findings as to the Facts,
o petitioners collectively as "Anaconda"
such expressions as "Anaconda (Inter-
"respondent Anaconda (International
Refining Company and the other sub-
naconda Copper Mining Company)" and
ries of Anaconda Copper Mining Com-
or and on behalf of said respondent" is
nd erroneous, is not supported by the
is contrary to law.

ndings are erroneous and not supported
ce to the extent that they state or imply
r Anaconda ever engaged, or is now
he manufacture, sale or distribution of
ments or did or performed any of the
ces which were the subject of the pro-

ission erred in failing to indicate which
and their co-respondents are claimed to
vidence to be connected with all or any
ndings, but has merely referred to "re-
respondents," "respondents herein,"
ondents," and similar ambiguous and in-
y, to imply the connection of all or some
ters referred to in a particular finding
g to designate, name or otherwise iden-
of them are actually connected with or
ected with said matters.

s are erroneous and not supported by
e extent that they state or imply that
tional (1) ever manufactured, sold or
d pigments other than dry white lead
oil; or (2) ever manufactured, sold or
d pigments prior to about October 31,
w, or has been since about September

1946, connected in any way with the manufacture, sale or distribution of any lead pigments.

(m) The findings and conclusion are erroneous and not supported by the evidence in so far as they state or imply that petitioners entered into, continued, co-operated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or threatened to do so, or have done any of the things found to have been done in support of any such planned common course of action, understanding, agreement, combination, or conspiracy, as charged in the amended complaint or otherwise.

(n) The finding in Paragraph One (f), that petitioners "agreed to use [American Smelting and Refining Company's] daily quotations of lead prices as the basis for quoting spot carload prices on red lead and litharge" is erroneous and not supported by the evidence.

(o) The findings, in Paragraph Seven (a), that petitioners were members of the Lead Pigment Division of the Lead Industries Association and that said Division "was the medium through which the discussions and group actions which were destined to revolutionize the pricing practices and methods of the respondents, took place" are erroneous and not supported by the evidence.

(p) The finding, in Paragraph Seven (b), that petitioners or petitioner "Anaconda, by its subsidiaries" "participated actively in the entire series of meetings" thereafter referred to in the findings, is erroneous and not supported by the evidence.

(q) The finding, in Paragraph Ten (a), that "the meetings and discussions" referred to, "during the period from July 1933 to June 1934, resulted in understandings and agreements" between either petitioner and any of its co-respondents to do any of the things thereafter referred to in the findings, is erroneous and not supported by the evidence.

(r) The implication, in Paragraph Ten (b), that petitioners participated in any discussions or reached "agreements for concerted action," and the finding in that paragraph that the discussions "were actually engaged in for the purpose, and certainly they had the effect, of cooperatively revising the pricing practices in the industry in a manner far beyond the sanction of the National Industrial Recovery Act" are erroneous and not supported by the evidence.

(s) The opinion and finding, in Paragraph Ten (b), that there is no foundation in fact to the contention that the alleged "price fixing activities were solely in response to Governmental demands and that their meetings were devoted exclusively to efforts to formulate a supplemental code of fair competition under the National Industrial Recovery Act" are erroneous and not supported by the evidence.

(t) The findings, in Paragraph Eleven. are erroneous and not supported by the evidence to the extent that they imply that petitioners in 1933 and 1934 devised, or participated in the devising of, the "uniform zone pricing system" there described, or that petitioners at any time thereafter followed that system.

(u) The findings, in Paragraph Twelve, are erroneous and not supported by the evidence to the extent that they imply that the consignment arrangement employed by petitioner International or by Anaconda Lead Products Company in the sale of lead-in-oil was the same as, or in an way patterned upon, the consignment plan used by any other respondent.

(v) The finding, in Paragraph Thirteen, that petitioners, from 1934 to the present time, "have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments," which the Commission claims were "agreed upon in 1933 and 1934," is erroneous and not supported by the evidence.

(w) The finding, in Paragraph Thirteen (a), that "from and after the early part of 1934 the pricing of lead pigments in accordance with the zone delivered pricing system" described in the findings "was the accepted practice" of petitioners is erroneous and not supported by the evidence.

(x) The finding, in Paragraph Fourteen, is erroneous and not supported by the evidence to the extent that it finds that petitioners adhered to "the trade practices and pricing methods" claimed to have been "agreed upon by them in 1933 and 1934," and to the extent that it implies that petitioners in fact "agreed upon" any such trade practices and pricing methods.

(y) The findings, in Paragraph Fourteen (c), are erroneous and not supported by the evidence in so far as they state or imply that any subsidiaries of petitioner Anaconda acted for or on behalf of said petitioner, or that

such subsidiaries or either petitioner herein adhered to the "zone methods and pricing policies" claimed to have been agreed upon in connection with sales of white lead-in-oil and dry white lead, or "followed" from the code period to 1946 the practices claimed to have been "adopted in 1933 and 1934," or that the testimony of an official of petitioner International demonstrates such "adherence," or that petitioners' "only deviation * * * from the agreed upon practices was in connection with sales of white lead-in-oil," or that resale prices to consumers and painters were "set."

(z) The findings, in Paragraph Fifteen, with respect to the "combined results" of the claimed use of the described practices, are erroneous and not supported by the evidence, as are the further findings and conclusions with respect to the claimed "continuous rigidity and uniformity in prices, terms and conditions of sale," "understandings and cooperative activities," "mutual understanding and acceptance [on the part of the respondents] of an overall plan and an intention on the part of each of the respondents to follow it," and "conspiracy on the part of all of the respondents," and the claim that "each of the respondents has gone far beyond the requirements of competition, and beyond the necessities imposed by National's price leadership," and that their practices "could not have resulted from other than agreement and conspiracy" are erroneous, are not supported by the evidence, and are contrary to law.

(aa) The further findings, opinions and conclusions in Paragraph Fifteen, with respect to the contention that the practices alleged to have been employed by respondents are not subject to corrective action by the Commission by reason of the provisions of Section 5 of the National Industrial Recovery Act, are erroneous, are not supported by the evidence, and are contrary to law.

(bb) The finding, in Paragraph Eighteen, that each of the petitioners "after 1934 sold its white lead, both dry and in oil, at the same delivered prices to all customers in the par or base zones," with certain stated differentials "added to such prices on sales to all customers in locations outside of the par zones"; the further findings and conclusions with respect to the "competitive effect of these differences in sales to purchasers in the vicinity of zone borders" and the implication that petitioners' different prices for

white lead "involved discriminations as between purchasers of such products located in the different zones" who "were shown to be in competition with each other" are erroneous, are not supported by the evidence, and are contrary to law.

(cc) The finding, in Paragraph Nineteen, that the "differential of one-quarter cent per pound between carload and less-than-carload shipments of dry white lead allowed by each of the respondents in the producing areas was discriminatory" is erroneous and not supported by the evidence.

(dd) The findings and conclusions, in Paragraph Twenty (a), (b) and (c), with respect to the effects of employment of and justification for "inter-zone prices of lead pigments," "differing prices" for different quantities, and the allowance of a one-quarter cent per pound on shipments of dry white lead in carload quantities to purchasers in the proximity of producing plants are erroneous, are not supported by the evidence, and are contrary to law.

(ee) The opinions, findings and conclusions, in Paragraph Twenty-one (a) and (b), with respect to the "tendency, capacity and effect" of the alleged "combinations, conspiracies, agreements and understandings" and "acts, practices and methods performed thereunder and in connection therewith," and with respect to the "effects" of the alleged "discriminations in price" and the "additional effects of the aforesaid price discriminations" are erroneous, are not supported by the evidence or by the findings, and are contrary to law.

With Respect to the Commission's "Conclusion".

(ff) The conclusion that the alleged "combinations, conspiracies, agreements and understandings" and "acts and practices pursuant thereto and in connection therewith" have constituted "unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act" is erroneous, is not supported by the evidence or by the findings, and is contrary to law.

(gg) The conclusion that the alleged "discriminations in price by each of the respondents" have constituted violations of Section 2 (a) of the Clayton Act, as amended, is erroneous, is not supported by the evidence or by the findings, and is contrary to law.

17. Petitioners also assign as error and intend to rely on the Commission's error in denying, in its Order issued on or about March 6, 1947, their motions to dismiss the amended complaint as to them.

18. Petitioners also assign as error and intend to rely on the Commission's error, in its Orders issued on or about January 12, 1953, in denying various exceptions filed by petitioners to the Trial Examiner's Recommended Decision and in granting certain exceptions filed by counsel supporting the complaint.

IV.

Prayer for Relief.

Wherefore, your petitioners pray that:

1. A certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, including all the evidence taken and the Findings as to the Facts and Conclusion and the Order to Cease and Desist of the Commission.

2. The Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's Recommended Decision and the exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. This Court review the entire record in the proceeding, including all the evidence taken, the several objections, exceptions and motions made on behalf of petitioners and their co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's Recommended Decision, the exceptions filed thereto by and on behalf of petitioners and their co-respondents, the motions made by and on behalf of the petitioners and their co-respondents before the Commission and the rulings thereon by the Commission, the Findings as to the Facts, Conclusion and Order to Cease and Desist, and that this Court set aside, vacate and annul said Findings, Conclusion and Order and order the Commission to dismiss the amended complaint issued by it against your petitioners.

4. Your petitioners have such other, further and different relief as is just.

Dated: March 10, 1953.

Anaconda Copper Mining Company,
Petitioner,
By (Signature illegible),
Secretary.

International Smelting and Refining Company,
Petitioner,
By (Signature illegible),
Secretary.

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Of Counsel.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

National Lead Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent.
No. 10839.

The Sherwin-Williams Company,
Petitioner,
vs.
Federal Trade Commission,
Respondent.
No. 10840.

The Eagle-Picher Company, *et al.*,
Petitioners,
vs.
Federal Trade Commission,
Respondent.
No. 10841.

Anaconda Copper Mining Co., *et al.*,
Petitioners,
vs.
Federal Trade Commission,
Respondent.
No. 10842.

STIPULATION.

(Filed July 9, 1953. Kenneth J. Carrick, Clerk.)

Whereas, the record in this case contains more than 4,900 pages of documentary exhibits; and

Whereas, most of the important exhibits will be included in the printed record or presented to the Court for consideration in accordance with the provisions of Rule 14(c) of the Rules of the Court; and

Whereas, the record contains certain bulky exhibits such as series of price lists, invoices, and tabulations, the reproduction of which would be expensive and impracticable.

Now, Therefore, it is stipulated and agreed by and between the petitioners and the respondent that, subject to the approval of the Court, documentary exhibits not included in the printed record or submitted in accordance with the provisions of Rule 14(c) may nevertheless be referred to in briefs and oral argument by any party.

National Lead Company,
By Miles G. Seeley, RWB.

The Sherwin-Williams Company,
By Miles G. Seeley, RWB.

The Eagle-Picher Company,
By Brown, Fox, Blumberg & Markheim.

Anaconda Copper Mining Co.,
By (Signature illegible).

Federal Trade Commission,
By Robert B. Dawkins,
Assistant General Counsel.

Dated: July 6, 1953.

3887 In the United States Court of Appeals for the Seventh Circuit

OCTOBER TERM AND SESSION, 1955

No. 10839

NATIONAL LEAD COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10840

SHERWIN-WILLIAMS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10841

THE EAGLE-PICHER COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10842

ANACONDA COPPER MINING COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

December 1, 1955

Before LINDLEY, SWAIM and SCHNACKENBERG, Circuit Judges

Opinion

LINDLEY, Circuit Judge. Petitioners seek to set aside a cease and desist order entered by the Federal Trade Commission
3888 on an amended complaint charging them and the Glidden Company with violation of Section 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), and Section 2 (a) of the Clayton

Act, as amended by the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13. Count I of the complaint, filed April 12, 1946, charged that petitioner, National Lead Company, had violated and was violating "Section 5 * * * by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce", and that all named parties were violating the Act by combining and conspiring "among themselves and with each other" for the purpose and with the effect of eliminating competition in prices and terms of sale of lead pigments in commerce. Count II charged all parties with discrimination in prices by means of various zone pricing methods and quantity and functional discounts.

Various attacks are made upon the validity of the order, or portions thereof, addressed to the alleged insufficiency of the evidence to support the findings and to the scope of the order. Some of the questions posed apply only to a single petitioner, while others are applicable to all.

I. Propriety of the Order Against Anaconda Copper

We shall first dispose of the contention of petitioner Anaconda Copper Mining Company that the order cannot stand as to it, based on its assertion that it has never engaged in the industry as a producer, distributor or otherwise. In 1919, Anaconda Lead Products Company, a wholly owned subsidiary of Anaconda Copper, began production of lead pigments. International Smelting & Refining Company, another wholly owned subsidiary, acquired all the assets of Anaconda Lead in 1936 and thereafter, until 1946, engaged in production of certain lead pigments which were sold by it and by Anaconda Sales Company, a third subsidiary of Anaconda Copper. International was a respondent in the proceeding and is one of the petitioners here. Anaconda Lead (dissolved in 1936) and Anaconda Sales are not parties.

At the conclusion of the evidence in support of the complaint, Anaconda moved to dismiss as to it urging that the evidence failed to show that it had ever engaged in manufacture or sale of the products. The Commission denied the motion, holding that Anaconda had been engaged in the pigments field "through its wholly owned subsidiaries." The Commission found that Inter-
3889 national and Anaconda Lead "were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own", and that all their acts and those of Anaconda Sales were those of Anaconda. On this basis, the cease and desist order was directed against Anaconda Copper.

We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda

Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.

These sparse gleanings from the record fail to support the Commission's finding of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction. Press Co. v. N. L. R. B., 118 F. 2d 937, at 946–947, cert. denied 313 U. S. 595 (CA–DC); Owl Fumigating Corp. v. California Cyanide Co., Inc., 30 F. 2d 812 (CA–3)., Such a finding has no substantial support in this record. The complaint should have been dismissed as to this petitioner.

II. The Conspiracy Findings

The principal question raised by the remaining petitioners is whether the Commission's findings that the parties conspired to fix and control the prices and bases for sale of lead pigments is supported by substantial evidence. The parties are Na-
3890 tional Lead Company, Eagle-Picher Lead Company, together with its affiliate Eagle-Picher Sales Company, The Sherwin-Williams Company and International Smelting & Refining Company. The Glidden Company, though not a petitioner, was also charged as a coconspirator. All are engaged in the production, sale and distribution of lead pigments. National is the leader and produces some 50% or more of the domestic production. Its nearest competitor, Eagle-Picher, accounts for a substantial part of the remaining 50%, while each of the other companies occupies a relatively minor position in the industry.

The three principal products included in the lead pigments category are dry white lead, white lead-in-oil [1] and lead oxides, red lead and litharge. White lead is used principally as a base

[1] This term, when used herein, includes all the so-called keg products, red lead-in-oil, etc. The keg products are used principally as pigments for paints, and marketing practices for these products are the same as those employed in marketing white lead-in-oil.

in paints and its chief market lies in the demands of manufacturers of mixed paints. White lead-in-oil is a semimixed paint consumed principally by the individual painter or painting contractor who prefers to mix his own paints. The oxides are used mostly by the battery industry as the basic constituent in the manufacture of plates.

Throughout the record, a clear distinction is drawn between the several parties' respective actions in sales of each of the three kinds of pigments. Although the evidence as to practices in each of these fields differs, there are, nevertheless, certain threads of similarity in the methods employed by the various petitioners which render it practical to treat the conspiracy question as a unit, pointing out, wherever necessary, the applicability or inapplicability of a particular evidentiary segment to one or more of the several petitioners. Each engages in the production of white leads and oxides, except that International confines its activities to white leads and has never produced oxides.[2] Unless otherwise noted, all facts narrated and all statements pertinent thereto apply to all petitioners alike, except that factual statements and discussions which relate solely to the oxides apply to all petitioners except International.

The facts as found by the Commission follow. Prior to
3891 1933 no standard pricing system was employed in the industry. Each producer established its own practices as to prices and conditions of sale. For the most part, with respect to delivered sales prices, each employed its own system of pricing, based on shipping differentials from centrally located warehousing points. For example, National's lists from 1920, until 1933, include some 589 different cities in 40 states, which it, from time to time, used as free delivery or equalization points. The practices of other petitioners differed quite widely.

In 1933, however, each petitioner participated in discussions looking to the adoption of a code of fair competition under the provisions of the National Industrial Recovery Act. These discussions occurred in two committees set up by the Lead Industries Association, one to draft a code for white lead-in-oil marketing and the other a code for the dry pigments, including dry white lead. Discussion within each group dealt with a wide range of subjects relating to prices, freight, quantity and quality differentials and terms and conditions of sales. Tentative agreements, at least, were reached as to terms of the proposed code, including an agreement to sell pigments only on a delivered price basis.

With respect to white lead-in-oil, prices were to be based on a system of par and premium zones, sales were to be made by agency

[2] International withdrew from the pigments field entirely in 1946. Its contentions based on this fact are subsequently considered herein.

or consignment methods of merchandising, and premium differentials in steps amounting to ¼ cent per pound on an ascending scale were to be added on sales in 50, 25 and 12½ pound containers over the price based on the norm of a 100 pound container. For dry white lead, a zone system of pricing was approved, as was a ¼ cent per pound premium to be added to less-than-carload shipments of less than 20 tons. In effect, the committee agreed not to adopt uniform conditions for sales, on advice of counsel that to do so might amount to a violation of the antitrust laws. Instead, an alternative course was suggested, namely, that one or more of the parties put into effect the uniform terms under discussion, which the others might follow. Agreements in the group considering oxide sales dealt with separate zone systems for carload and L. C. L. sales, including a standard price for carload sales pegged on the cost of pig lead as shown by daily quota-
3892 tions of the American Smelting & Refining Company,[3] a price for L. C. L. sales based on a premium differential over the carload price and a premium differential to be added to the price of red lead containing a Pb_3O_4 content of 95% or higher.

Certain of these provisions were included in the code, while others apparently never reached that stage. The code, though adopted, never became operative, however, inasmuch as petitioners, immediately upon its adoption, sought and obtained exemption from its terms.

The Commission found that petitioners, during the NRA discussions, agreed to "cooperatively revise the pricing practices" in the industry in such a manner as to constitute a violation of the Trade Commission Act, and effectuated that agreement by adopting uniform methods of pricing and sales throughout the United States. Practices found to have been put in effect pursuant to that plan in the sale of white lead-in-oil follow. Beginning in early 1934, petitioners began pricing the product on a uniform, delivered card price basis in a par zone enclosing all the area bounded roughly by the western borders of the States of Wisconsin and Illinois and by the southern boundaries of the States of Kentucky, West Virginia, Maryland and Delaware, but including the City of Saint Louis, Missouri, and the San Francisco area of California. The remainder of the nation was divided into some 7 premium zones in which premiums ranging from 12½ cents to $1.00 per cwt. were added to the par zone selling price. About the same time, petitioners, except Sherwin-Williams, adopted a consignment method of selling, under which stocks were consigned to dealers to be sold at the standard card price, plus premiums, if any, on a commission basis. Thirdly, a quantity differential was imposed upon sales in container sizes

[3] This Company will be referred to as AS & R hereafter.

unds as follows: ¼ cent per pound on 50 pound, nd on 25 pound and ¾ cent per pound on 12½ s. One variation was noted by the Commission, l, Sherwin-Williams and Glidden systematically prices to dealers for white lead-in-oil, at about 25 elow that fixed for National's "Dutch Boy" and "Eagle" brands. It found, however, that the etitioners was offered to the public at identical he 25 cent reduction of these companies in dealers' ce intended to encourage dealer incentive to pro- products in competition with the widely known ted "Dutch Boy" and "Eagle" brands.

lowing practices were found to have been adopted ct to sales of dry white lead. All sales were made livered price basis in a par zone, which included f the eastern borders of Montana, Wyoming, w Mexico. A premium of 25 cents per cwt. was es in states west of this boundary. Uniformly, ential of 25 cents per cwt. was added to the price of less than 20 tons.

o oxides sales, the Commission found that peti- adopted a uniform zone pricing system, with ces for carload and L. C. L. sales. For purposes he United States was divided into two par zones nium zone, while, for the latter, a single par zone ium zones were established. Prices were fixed differentials of $1.50 and $2.50 per cwt. over ion for pig lead, geared to fluctuate up or down s of 25 cents or more. This was the standard d sales. A premium of 40 cents per cwt. was . sales of five tons or more and of 90 cents per oad charges for sales of less than five tons. Uni- rices of 25 and 50 cents per cwt., based on lead ablished for red lead containing a Pb_3O_4 content ve. As to sales of all dry products, including the Commission found that petitioners adopted 1% cash in 10 days, net 30 days or 2% cash in 10 ; and that at any given time the terms as quoted were identical.

ption of Sherwin-Williams, petitioners do not ng that they employed uniform zone pricing sys- spect they question only the sufficiency of the rt the findings that petitioners adopted the zone to agreement and that all adopted it at or about The most that can be said of these contentions

is that in some respects the evidence is conflicting. It includes the testimony of petitioners' officers, price cards, invoices and other exhibits on which the Commissions could well find that all petitioners adopted the zone system of pricing shortly following the NRA discussions. The Commission has resolved the conflict in the evidence adversely to petitioners and it is beyond our province to substitute our judgment in that respect.

3894 The argument of Sherwin-Williams that it did not employ the zone system of pricing must also fail. That company employs, for example, an elaborate list of cities throughout the area in which it does business showing many of them as equalization, or par, points, and others as localities warranting, as they say, premium prices ranging from 12½ to 75 cents per cwt. on sales of white lead-in-oil. Comparison of this list with the zone maps employed by the other petitioners reveals that the par and premium city listings conform precisely in physical location and scale of premium charges with the established zone system of other petitioners. In view of this evidence, we cannot say that the finding that this petitioner participated in and used the uniform zone system lacks substantial support.

The most serious attack lodged against the conspiracy findings is that there is no substantial support for a finding of existence of an agreement among the parties to adopt uniform prices and terms of sale. The corollary of that position, viz, that the striking similarity between prices, practices and the conditions of sale fixed by each petitioner is merely the effect of conscious parallelism on the part of petitioners in the sale of products of standard quality and constituent content, is likewise advanced. Although submitted as separate questions, we think the two issues so inextricably related as to require that they be treated together.

Although there is no direct evidence as to formal agreement on the part of petitioners to adopt the zone system and uniform pricing practices, the finding does not necessarily fall. A conspiracy may be proved by circumstantial evidence. Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175, aff'd. sub. nom Clayton Mark & Co. v. FTC, 336 U. S. 956 (CA–7); Allied Paper Mills v. FTC, 168 F. 2d 600 cert. denied, 336 U. S. 918 (CA–7). As we observed in Fort Howard Paper Co. v. FTC, 156 F. 2d 899, at page 906 (cert. denied 329 U. S. 795):

"Very pertinently it was pointed out in the Malsters case [United States Malsters Ass'n v. FTC (CA–7)], 152 F. 2d at pages 162 and 164: 'As might be expected, there is little, if any, direct proof of an express agreement. Such proof, however, is not necessary. The agreement may be inferred from the acts and

conduct of the parties as well as circumstances pertinent thereto.'"

3895 And, in Milk & Ice Cream Can Institute v. FTC, 152 F. 2d 478, we said at page 480:

"In determining whether such finding [of an agreement to fix prices] is supported, it is not necessary, as argued, that there be direct proof of agreement. Such agreement may be shown by circumstantial evidence, and the Commission, the same as any other fact finding body, is entitled to draw any reasonable inference from the circumstances of the situation."

There is before us evidence that petitioners met in 1933 and 1934 in the committees of the Lead Industries Association and discussed and appraised all elements of pricing and sales practices affecting the industry. The minutes of those meetings and the correspondence between the parties, or between certain of them and officers of the committees, support the conclusion that there were wide areas of tentative agreement upon revisions of such practices. As previously stated, some of these tentative agreements were included in the code adopted in May of 1934. We have found that the evidence sustains the finding that all petitioners did, in fact, adopt the zone system of pricing in May 1934 or shortly thereafter. Price cards and other exhibits tend to show that zoning, and other aspects of uniform pricing, were uniformly adopted practically simultaneously by all petitioners and that changes in certain details from time to time have been put into effect by all petitioners practically simultaneously. The inference of agreement, if not necessarily impelled by this evidence, is certainy a reasonable one which the Commission as the trier of fact was entitled to draw therefrom. Milk & Ice Cream Can Institute v. FTC, supra, at 480; Fort Howard Paper Co. v. FTC, supra at 906–7; Allied Paper Mills v. FTC, supra at 607. Our language in the latter case at page 607 is pertinent, to wit:

"We canot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. * * * Moreover, a uniform participation by competitors in a particular system of doing business,

3896 where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy. William Goldman Theatres, Inc. v. Loew's, Inc., 3 Cir., 150 F. 2d 738, 745."

It is unimportant, we think, that this record does not disclose a closely knit operation by petitioners under a central information gathering and disseminating body as was the fact in such cases as FTC v. Cement Institute, 333 U. S. 683; United States v.

Socony-Vacuum Oil Co., 310 U. S. 150, and the Milk Can Institute case, supra. The absence of this aspect of many price fixing agreements may indicate nothing more than that the very small number of competitors involved in the field rendered needless such a watch-dog agency.

Petitioners, to refute the finding of conspiracy, rely, also, on evidence of sales prices which varied from the card prices. This, it seems to us, is merely an invitation to weigh the evidence and redetermine the facts. However, assuming arguendo that the question is properly ours to decide, it is clear that such off-card sales as the record discloses represent only a minute percentage of the hundreds of sales reflected in invoices included in the record. And, in the oxides field, such sales represent substantially uniform price concessions to large battery manufacturers to discourage them from producing their own supplies of oxides. Furthermore, it is clear that a finding of unbending price uniformity is not a requisite of a finding of conspiracy to control prices, but that any device which has the purpose and effect of fixing prices to consumers is an illegal restraint of trade. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 222–3, and "it is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible." Allied Paper Mills v. FTC, 168 F. 2d 600, 607 (CA–7). The same principle applies to evidence that petitioners' bids on government contracts frequently were not uniform. We cannot say that the inference of agreement cannot stand in the face of such evidence.

What has been said with reference to agreement disposes in part of the conscious parallelism argument. Petitioners contend that National is the price leader in the field and that the other petitioners merely meet its prices in order to stay in business.

3897 While parallel business behavior among competitors is not illegal per se, Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537, 541, we do not believe the protective mantle of "conscious parallelism" can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs. See Allied Paper Mills case, supra at 607; Fort Howard case, supra, at 907; Milk Institute case, supra at 483. This pricing structure seems so arbitrary and artificial as to negative an inference of innocent parallel behavior and to require an inference of at least tacit prearrangement, in view of the record disclosures that all petitioners participated in discussions at which they explored the advantages of the very pricing practices which shortly later they uniformly adopted. American Tobacco Co. v. United States, 328 U. S. 781,

809; Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226–227; Allied Paper Mills v. FTC, supra at 607–8.

Closely related to the parallel behavior argument is Eagle-Picher's assertion that, although it systematically matched National's pricing and sales practices, it nevertheless competed vigorously with the latter by supplying its customers with technical assistance and other additional services. In view of our conclusion that the finding of an agreement is justified, it is a sufficient answer to this argument to reaffirm the well settled postulate that it is unlawful for competitors, by agreement, to block off any of the normal channels of competition with the purpose of establishing identical prices for products of like grade, even though other facets of normal competition may remain unfettered. FTC v. Cement Institute, supra; United States v. Socony-Vacuum Oil Co., supra. This principle rests on the view that the purchasing public is entitled to an opportunity to bargain with competing firms with regard to purchase prices of products of like quality.

III. Price Discrimination

Under Count II of the complaint, the Commission found that petitioners and Glidden were guilty of price discrimination in the sale of lead pigments in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 3898 § 13. Specifically, it found that the zone and quantity differentials were unlawful, except that the carload discount on dry white lead was justified by cost factors on shipments made by rail.

The principal attack on these findings is that there is no substantial evidence of a probability that such price differentials would have an adverse effect on competition between petitioners' various customers. Petitioners argue that the zone boundaries for each type of pigment follow natural trade barriers, that the evidence does not support the finding that competition in fact existed between dealers in the several zones and that the zone and quantity differentials are so insignificant as to negate any effect on competition between purchasers of petitioners' products.

In view of the zealous contention, bordering on an argument that the Commission must prove concretely that petitioners' price differentials have had an unlawful effect on competition, it is well to refer to the test by which such findings must be measured. Evidence of a probability that discrimination in price between competing purchasers will have the effect of injuring competition is sufficient to sustain finding on a § 2 (a) violation. As the Supreme Court said, in Corn Products Refining Co. v. FTC, 324 U. S. 726, 738, the statute "does not require a finding that the discriminations in price have in fact had an adverse effect on competition.

The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. * * * Cf. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356–357. But, as we held in the Standard Fashion case, supra, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." And in FTC v. Morton Salt Co., 334 U. S. 37, 47, the Court again defined the test in these words: "the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." Cf. Corn Products Co. v. FTC, supra at 742. When the evidence of record is considered in the light of this test of a reasonable possibility of injury to competition, we must conclude that most of the Commission's findings of § 2 (a) violations are substantially supported.

3899 With respect to white lead-in-oil sales, the Commission found that petitioners discriminated in price in favor of certain dealers by selling their products at a single price within a par zone and at premiums above such price ranging from 12½ cents to $1.00 per cwt. to dealers located outside the zone. It found that these differentials constituted illegal discriminations which tended to injure competition between competing dealers located near the boundaries of adjoining zones.

Petitioners urge that the zone boundaries follow natural trade barriers, and that there is no evidence that dealers do, in fact, compete across those zonal boundaries, inasmuch as the product is marketed by them only locally, as a semimixed paint, to individual painters.

The evidence does tend to indicate, however, that competition is keen between dealers in paint products including white lead-in-oil. Furthermore, the evidence tends to show also that there is more than a reasonable possibility that competition would be likely to cross the arbitrary zonal walls which petitioners have erected. We need only refer to one phase of the proof in this respect, namely, that these zonal boundaries dissect 10 states, in some instances placing a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located. Illinois, Wisconsin and Kentucky are largely in a par zone, but substantial areas in the western part of each are in the 12½ cent premium zone, while the city of Saint Louis is segregated from the remainder of the State of Missouri in a par as contrasted to a 12½ cent status respectively. The cities of San Francisco, Oakland and Berkeley are par territory, while the remainder of Cali-

fornia is in a 25 cent zone. The area immediately encompassing the cities of Omaha, and Lincoln, Nebraska, and the cities of Atchison, Leavenworth and Kansas City, Kansas, are in the 12½ cent zone as contrasted to a 25 cent status for the remaining area of their respective states. The States of Oregon and Washington are divided roughly equally between the 25 and 50 cent zones. Finally, a zonal boundary approximating the location of the Appalachian barrier separates the 25 cent zone of western Virginia from the 12½ cent status of the eastern portion of the State.

With the possible exception of the last mentioned state, the record impels us to conclude that the barriers which
3900 dictated the location of the zonal boundaries were those due to the location of plants of one or more of petitioners and to possibly other considerations known only to the trade. The inference that this division probably would have the deleterious effect on competition which § 2 (a) proscribes is certainly a reasonable one which the Commission as the trier of the facts was entitled to draw from the evidence before it.

With respect to dry white lead sales, the Commission found that petitioners had discriminated in price by offering their product for sale to all customers within a par zone at a price 25 cents per cwt. below that offered to dealers outside the zone. It found also that the 25 cent carload-L. C. L. differential constituted an illegal discrimination against small purchasers, where delivery was made by local carriers, but found that this differential was a justified cost factor on shipments made by rail. Petitioners challenge each of the adverse findings.

We fail to find in the record any evidence supporting the finding of competitive injury resulting from the zone differential. Petitioners employ two zones in marketing this product, a par zone including all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. The states west of this line are in the 25 cent per cwt. premium zone. While there is substantial evidence of a highly competitive relationship between mixed paint manufacturers, the principal consumers of dry white lead, there is no evidence that competition does in fact exist between those in the eastern par zone and those in the Rocky Mountain-Pacific Coast premium zone: To this extent the Commission's order is without basis in fact.

But there is no merit to petitioners' contentions relative to the quantity differential. The evidence tends to indicate, and the Commission found, that a large proportion of mixed paint manufacturing is centralized in and around Chicago, Saint Louis and other metropolitan districts; that one or more of petitioners operate white lead plants in each of these areas; that shipments to such manufacturers are generally by local cartage, and, finally, that the 25 cent per cwt. premium for L. C. L. shipments bears

no reasonable relationship to added costs incurred in such shipments. The reasonable probability of injury to competition is certainly a justifiable inference which the Commission was entitled to draw from this showing.

3901 With respect to lead oxides, the Commission found that petitioners, except International, discriminated in price in favor of certain customers as follows: by selling carload lots to all customers in a par zone at a uniform delivered price 25, 50 or 75 cents per cwt. below that accorded to purchasers in each of three premium zones; by a uniform base price of $1.50 for litharge and $2.50 for red lead over AS & R's New York quotation for pig lead and adding the applicable zone differential thereto; and by charging different prices for oxides in carload and L. C. L. purchases, by adding to the carload price 40 cents per cwt. for L. C. L. purchases of more than 5 tons and 90 cents per cwt. on those of less than 5 tons. The Commission found further that the oxides are used principally by the storage battery industry, which is composed of some 200 manufacturers ranging in size from relatively small operators to industrial giants; that this is a highly competitive industry in which the little manufacturer competes not only against Exide, Willard and other large producers, but also against Sears Roebuck and other large mail order and chain store retailers; that each of the price differentials alluded to added as much as 12 cents to the cost of production of a battery, and that an increase in cost of 5 to 10 cents per battery might, and did, during a substantial period of time involved herein, represent the difference between a profitable operation and a losing one on some types of batteries. The most favorable light which the record affords to petitioners is that the evidence as to the fact of competition and the effect of these differentials thereon is conflicting. Consequently, as that conflict has been resolved adversely to petitioners by the triers of fact, we may not substitute our judgment on this phase of the case.

We observe briefly the argument, which applies to all pigments involved, that the price differentials were such an insignificant factor that no threat of adverse effect on competition can be spelled out. For example, the added unit costs of up to 8 cents per gallon of mixed paint and of up to approximately 12 cents per storage battery are singled out. We believe, however, that this raises a question peculiarly within the competence of the Commission, and that its determination thereon, as an expert administrative body, should be accorded full respect. The Commission was conceived and created by Congress as an agency espe-

3902 cially informed and equipped to act to sustain the vigor of the economic pulse. Perhaps in no other field is the economic pulse, as envisaged in § 2 (a), so critically reflected as it is in the close relationship between added unit cost differences

brought about by discriminatory pricing of raw components entering into the unit and the effect of such cost on competition within an affected industry. The courts are extremely reluctant to set aside the Commission's finding that a discriminatory price, though small, adversely affects the health of competition. See FTC v. Cement Institute, 333 U. S. 683, 726. It is noteworthy also, with respect to the § 2 (a) determinations, that Commissioner Mason, who filed a vigorous dissent against other portions of the Commission's order, concurred fully in the parts pertaining to price discrimination.

IV. Incipient Monopoly

The complaint charged, and the Commission found, that National had, beginning in 1891, engaged in acts tending toward substantial control of and a monopoly in the pigment industry in violation of Section 5 of the Trade Commission Act. Accordingly, it ordered the company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock, or properties of any of its competitors in the lead pigments field.

In this respect, National asserts that the Commission has no power under Section 5 to enjoin acquisitions of stock or assets which do not constitute a violation of Section 7 of the Clayton Act, 15 U. S. C. § 18. Irrespective of the Commission's power under § 5, we think the order so wanting in evidentiary support and so arbitrary that it cannot stand in any event. Therefore, we do not consider the § 5 question.

The Commission found that National was incorporated in 1891, effecting a merger of some 16 companies engaged in pigment production, and that between that date and the mid 1930's it acquired the properties of more than 30 other producers. From 1931 to about 1935, National made several attempts to acquire the facilities of Eagle-Picher, its largest competitor. Thus, beginning in 1931, National purchased substantial holdings of Eagle-Picher stock, though it never attained a position even remotely approaching majority control. The larger part of this stock was
3903 sold in 1937. Approximately 3,500 shares were retained, but these were sold in 1944. Incidentally, whether this represented merely an investment, as National insists, the record discloses that it grossed more than $800,000 in profits on the Picher stock transactions.

In addition to these findings relating to petitioner's history, the Commission relied on evidence relative to certain contracts, to which National was party, to support its ultimate conclusion of incipient monopoly. Three of these were executed on February 26, 1906. By the first, between National and AS & R, the former agreed to buy from the latter all its requirements of corroding lead,

except an amount not to exceed 30,000 tons annually produced by Saint Louis Smelting Company, a wholly owned subsidiary of National, and 85% of its requirements of other types of pig lead, but not to exceed 85% of AS & R's production. Prices to be paid by National were pegged to AS & R's daily price quotations. It was agreed, further, that the excess of Saint Louis' production over 30,000 tons per annum would be sold to AS & R at a price substantially below the latter's daily quotation. The contract expired in 1921 and was not renewed. Under the second contract, National acquired all of the capital stock and securities of the United Lead Company, a holding company for all the securities of 13 producers of lead pigments. United was controlled at that time by a syndicate composed largely of AS & R's officers and directors, and AS & R had a substantial interest in United by virtue of stock ownership. By the third agreement, between AS & R and Hoyt Metal Company, a constituent company of National, Hoyt agreed to buy and AS & R to sell the latter's entire production of antimonal lead. The Commission referred to a fourth document, which, perhaps, should be mentioned in passing. In 1924 and in 1938, National agreed to supply du Pont's white lead-in-oil requirements on a processing fee basis. Under the terms of this contract du Pont furnished all raw materials and National manufactured therefrom and shipped the finished product at the former's direction on the payment of an agreed processing fee.

The ultimate finding of incipient monopoly is based on these findings as to transactions in the growth of petitioner to a dominant position in its field. We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a perpetual injunction against any future ac-
3904 quisition of stock or physical assets of National's competitors a startling one. The Commission stated that it had not considered the question of possible antitrust violations in petitioner's growth from 1891 to the middle 1930's. Nevertheless, it relied on findings which can have no purpose save possibly to prove that a monopoly already exists to support its order which is geared solely to prevention of monopolistic practices at some undisclosed future date. Thus, the order is not supported by the findings and must fall under the principles announced in the Universal Camera case. Universal Camera Corp. v. NLRB, 340 U. S. 474.

We are not here concerned with judicial pronouncements that the Commission has authority to determine the scope necessary in a cease and desist order to prevent violations of the Act. See e. g., May Stores Co. v. NLRB, 326 U. S. 376, 390–392. That principle assumes a present violation of the Act, in which case

the Commission is given wide latitude in framing its order to compel compliance with the Act.

But such is not the case before us. The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principal that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity. The language of the Court of Appeals for the Fourth Circuit in the New Standard case is pertinent:

"When an order of the Commission is before us for review, the statute provides that to the extent that we do not modify it, we shall use our injunctive power to enforce it, 15 U. S. C. A. § 45 (c); and it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do. * * * While an administrative agency is not a court of equity, its orders must be based on evidence giving them reasonable support, and such support is not given for an order relating to present
3905 and future practices by evidence relating only to transactions which occurred a decade before it was entered. * * * No one would contend that a cease and desist order should be upheld, if all the evidence supporting it related to business practices which occurred ten years before the filing of the proceeding. * * * " New Standard Pub. Co. v. FTC, 194 F. 2d 181, 183.

V. Validity and Scope of Order

The remaining questions relate to the validity of the order as against International and to its scope as applied to petitioners generally. These questions are hereinafter considered in the order in which they are stated.

A. Validity as to International

International asserts that the record shows conclusively that it ceased production of lead pigments in 1946; that, therefore, any issue as to its alleged violations has become moot and that the Commission abused its discretion in entering a cease and desist order against it.

The facts pertaining to this question are not in dispute. The original complaint was filed in 1944, and the amended complaint in April 1946. On both dates, and for about 10 years prior to

1946, International was engaged in the production and sale of white lead, both dry and in-oil at East Chicago, Indiana. In July 1946 it ceased production and, during the following month, the sale and distribution of the product was discontinued, and the trade given notice of the cessation. At no time since then, has petitioner engaged in any phase of pigment production or marketing. In October 1946 it sold its plant and facilities to Eagle-Picher.

On completion of the evidence offered in support of the complaint, this petitioner moved to dismiss the complaint against it on the ground that it had permanently abandoned its pigment activities. Petitioner relied on the facts related above and the supporting affidavit of its vice-president stating that petitioner had sold its plant and facilities; that, with one or two exceptions, all qualified pigments technicians and sales personnel had left its employ, and that the company had no intention "ever to reenter" the field.

3906 The Commission denied the motion in March 1947, on the ground that "it is not unlikely that respondent may in the future see fit to reenter" the field. However, upon the evidence submitted, the trial examiner later found that "There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments." Despite this finding, the Commission's order, issued in 1953, runs against International as well as the other petitioners and Glidden.

In Marlene's, Inc. v. FTC, 216 F. 2d 556, we had occassion to consider a similar situation. What we there said in reviewing decisions relative to the discretion lodged in the Commission to enter orders against discontinued practices is pertinent here; it need not be repeated. Id. at 559, and cases there cited. While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this "discretion must be confined * * * within the bounds of reasonableness." Id. at 559.

This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. As we have stated in our discussion of the monopoly question, the Commission is not empowered to "enjoin one from doing what he is not attempting and does not intend to do." New Standard Pub. Co. v. FTC, supra at 183; FTC v. Civil Service Training Bureau, 79 F. 2d 113 (CA-6).

The distinction on the facts between this cause and such cases as Marlene's Inc. v. FTC, supra, and Galter v. FTC, 186 F. 2d 810, cert. denied 342 U. S. 818 (CA-7), is readily apparent. In each of those cases it appears that the petitioning party was still

engaged in the same business in which the unlawful practices had been employed, and there was evidence from which the Commission might properly infer a public need for an order despite the fact that the specific unlawful practices had in fact been discontinued. Such a situation presents quite a contrast to the undisputed fact here that petitioner is no longer engaged in the industry in which the unlawful practice occurred and has divested itself of production properties.

And it is immaterial that petitioner may still be engaged in the smelting and refining of pig lead. No charges were
3907 before the Commision relating to that commodity, and there is nothing in the record to support any reasonable anticipation that petitioner will ever employ that commodity in pigment production. The cease and desist order entered in the face of this showing is arbitrary and must be set aside.

B. Scope of Order

There remains the question of whether the order is too broad, in that it purports to prohibit certain individual activity, i. e., whether the Commission exceeded its authority in this respect. In pertinent part the order prohibits any conspiratorial agreement or other concerted action to do those things which, according to the Commission's findings, amount to statutory violations. It expressly excludes from its edict agreements between any petitioner and its subsidiaries or affiliates which relate solely to the business of such petitioner and do not have the purpose or effect of unlawfully restricting competition. Petitioners do not challenge the propriety of the form of these provisions, but make an attack on the next paragraph, which restricts individual activity as follows:

"It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale; sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

This portion of the order is assailed on the grounds first, that it is improper, since the complaint did not charge, and the Commission did not find, that individual use of the zone delivered price method was an unfair method of competition and, second, that

the Commission is authorized under Sec. 5 to prohibit unlawful acts only and, conversely, it is without power to prohibit behavior which has not been found to be unlawful.

3908 The Commission insists that the paragraph represents an allowable judgment in its choice of a remedy, as is best shown by the language of its opinion, that "Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its product on a delivered prices basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

Reported judicial authorities and the elementary principles of statutory construction compel the conclusion that this paragraph is beyond the power of the Commission and must, therefore, be set aside. The grant of power in Sec. 5 of the Act is expressly restrictive. Under subsection (a) the Commission is empowered to prevent any person "from using unfair methods of competition * * * and unfair or deceptive acts or practices in commerce." Subsection (b) provides that, after a hearing and on a finding "that the method of competition or the act or practice is prohibited" by the Act, the Commission may issue an order requiring the person adjudged guilty of such conduct to "cease and desist from using such method of competition or such act or practice." 15 U. S. C. § 45 (a), (b).

The Commission may exercise only such powers as are granted to it by statute, Arrow-Hart & Hegeman Co. v. FTC, 291 U. S. 587,598, and its remedy against practices must comport precisely with the legislative grant of power. The section is specific; the permissible order is restricted to a prohibition of "unfair methods of competition" found to exist. In the Arrow-Hart case, supra, the Court said, at page 598:

"The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy."

To the same effect see FTC v. Eastman Kodak Co., 274 U. S. 619, 623–624; FTC v. Sinclair Refining Co., 261 U. S.

3909 463, 475, 476. While it is true that violations of the Clayton Act were charged in each of these cases, the same principle controls the scope of the permissible remedy under Sec. 5 of the Trade Commission Act. Compare the grant of power under the

§ 21 with that under Sec. 5 of the Trade
C. § 45 (a), (b).
ng that it may prohibit lawful actions
eemed necessary effectively to restrain
Commission relies on certain language
egel Co. v. FTC, 327 U. S. 608, 611–613,

ide discretion in its choice of a remedy
with the unlawful practices in this area
Here, as in the case of orders of other
der comparable statutes judicial review
further than to ascertain whether the
owable judgment in its choice of the
nission is the expert body to determine
o eliminate the unfair or deceptive trade
disclosed. * * * [A]nd the courts will
the remedy selected has no reasonable
ractices found to exist."
st be read in context, in the light of the
he Commission had determined that
cuna" as applied to coats was misleading
urther use of the term. The Court of
iegel Co. v. FTC, 150 F. 2d 751 (CA–3).
that use of the trade name was misleading
t attacked; the only question before the
her the Commission properly ordered
urt reversed and remanded, on its de-
nission had not considered whether, by
ng language in connection therewith,
ht be preserved. The quoted language
cussion of the propriety of the excision
hat context, does not, we believe, sanc-
gainst lawful acts.
o decision sanctioning an order such as
mmission is not restricted in its choice
g the illegal practice in the precise form
existed in the past." FTC v. Ruberoid
t may frame its order broadly to reach
wful conduct. Thus, in Ruberoid, the
ne use of all price differentials on its
employed by that Company of 5% and
y in violation of § 2 of the Clayton Act,
held that the Commission was not re-
r to the specific differential previously
ater, in the absence of a showing by
ls of less than 5% might be lawfully

The same principle was applied in Hershey Chocolate Corp. 1. FTC, 121 F. 2d 968 (CA–3). On a complaint charging unfair methods of competition in the sale of one candy item, the Commission had found that similar unlawful practices were being employed in the sale of several other confectionery items as well. The court sustained an order which prohibited all such unlawful practices which the Commission had found to exist, on the theory that the entire unlawful conduct was related to the specific unlawful practice of which complaint was made.

Other cases cited by the Commission fail to support its contention. In Dorfman v. FTC, 144 F. 2d 737 (CA–8), no question was raised but that the practice prohibited by the challenged portion of the order was unlawful. The determination in California Lumbermen's Council v. FTC, 115 F. 2d 178, 185, cert. denied 312 U. S. 709 (CA–9), was that the practices which the Council insisted were lawful were, in fact, an unlawful restraint of competition, under the holding in Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 612. And, finally, FTC v. Wallace, 75 F. 2d 733 (CA–8), must be read in the light of the unique situation there involved. That was a proceeding brought to enforce an order. The objectionable conduct existing prior to the proceeding in which the order was entered had been accomplished through the offices of an association, composed of all individual respondents, but, as the Commission found, wholly controlled by Wallace. After a cease and desist order was entered, the association was dissolved, but Wallace continued the same practices unabated
3911 in behalf of himself and the other ex-members of the association. The Commission filed a petition against Wallace only, for enforcement of its order. His answer did not deny the averments made; he demurred on the ground, inter alia, that the order restrained concerted conduct and, therefore, enforcement could not be decreed against him alone, to restrain his individual conduct. He did not deny that his own conduct was illegal, but argued merely that it did not come within the purview of the order. The court entered a somewhat unique decree, first modifying the Commission's order to prohibit individual as well as concerted use of the admittedly unfair practice, and then enforcing the order as thus modified, against Wallace alone.

In each of the cases upon which the Commission relies, the courts have sustained restraints only against conduct found to be unlawful, resolving all doubts in favor of the Commission's order in those gray areas wherein the legality or illegality of a particular course of conduct depends on the circumstances surrounding its use. Cf. FTC v. Ruberoid Co., 343 U. S. 470, 473. The individual practices against which this order runs are not shrouded in fog. On the contrary, the Commission expressly pointed out that it had not considered the individual use of the zone system, but con-

cluded that the portion of the order with reference thereto was necessary in order to prevent evasion. This position presents a striking contrast to the language of the Supreme Court in FTC v. Cement Institute, 333 U. S. 683, 727–728, wherein the Court, in affirming an order prohibiting conspiratorial use of a basing point system, carefully pointed out that it did not affect individual use of such system. Although no question of individual restraint was presented, the Court's meticulousness, in emphasizing the limitations of the order before it, is important as indicative of the esteem which it attached to preservation of the individual's right to adopt and employ his own business practices, notwithstanding the fact that concerted action between competitors to employ the same practices may violate the Act.

The part of the order with which we are now concerned does not differ in any significant respect from the one we struck down in Salt Producer's Ass'n v. FTC, 134 F. 2d 354. There, as here, we sustained the Commission's findings that the petitioners, acting in concert, had employed a uniform zone delivered pricing
3912 basis in the sale of salt. There, as here we sustained the determination that such concerted activity was violative of the Act and the order prohibiting its prospective use. There, as here, the complaint contained no allegations with respect to the individual use of the zone system. Petitioners were ordered to cease and desist from employing "any common cause of action * * * establishing or maintaining delivered price zones, or making quotations and sales of salt upon a delivered price basis under a zone system whereby the cost of salt * * * is made identical at all destinations within such zone." We set the order aside saying, 134 F. 2d at page 358:

"The complaint discloses the Commission's aim to eradicate and prohibit all concert of action by these petitioners, looking to the establishment and fixation of prices. There was no indication in the complaint that they were assailing the zone system per se as an unfair method of competition by one manufacturer in relation to two purchasers of his salt, in the same zone, where the freight costs are averaged, and one bears a greater burden than the actual freight cost incurred.

"If the zone system per se is to be condemned, there ought to be a hearing by the Commission and a finding on the precise issue of the unfairness of such a commercial practice."

Although the Salt Producers order is not identical with that before us, we think the two cannot be distinguished in principle. The Commission asserts that the present order does not restrain all individual use of the zone system but only that which has the effect of "systematically matching the prices" of a competitor at a particular designation. The fact remains, however, that there have been no complaint, no hearing and no findings relative to the

effect of such parallel individual actions. Salt Producers' Ass'n v. FTC, supra. Cf. FTC v. Gratz, 253 U. S. 421, 424.

Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up "the likelihood" that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an

> unwarranted anticipation of a situation which may never
> 3913 arise and an attempt to decide, by an anticipatory order,
> questions which will be a subject for this court to consider

should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.

If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. Salt Producer's Assn. v. FTC supra; Cf. Arrow-Hart & Hegeman Co. v. FTC, 291 U. S. 587; FTC v. Eastman Kodak Co., 274 U. S. 619, 623–624; FTC v. Western Meat Co., 272 U. S. 554; FTC v. Sinclair Refining Co., 261 U. S. 463, 475–476.

The order, as modified by this opinion, will be affirmed. The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

3915 In United States Court of Appeals for the Seventh Circuit

Before Hon. WALTER C. LINDLEY, Circuit Judge, Hon. H. NATHAN SWAIM, Circuit Judge, Hon. ELMER J. SCHNACKENBERG, Circuit Judge.

Nos. 10839, 10840, 10841, 10842

NATIONAL LEAD COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.

Judgment

December 1, 1955

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Federal Trade Commission entered in this cause on January 12, 1953, be, and the same is modified in accordance with the Opinion of this Court filed this day, and as so modified, will be affirmed.

The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

3916 In the United States Court of Appeals for the Seventh Circuit

No. 10839

NATIONAL LEAD COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10840

THE SHERWIN-WILLIAMS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10841

THE EAGLE-PICHER COMPANY, ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 10842

ANACONDA COPPER MINING COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Final decree

January 5, 1956

[File endorsement omitted]

The National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company and the International Smelting & Refining Company having filed in this
3917 Court petitions to review and set aside an order to cease and desist issued on January 12, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of National Lead Company, et al., Federal Trade Commission Docket No. 5253;" and the petitions having been heard by this Court on briefs and oral argument; and the Court having on December 1, 1955, filed its opinion providing for modi-

fication of said order of the Commission and for affirmance of said order as modified as to all petitioners except Anaconda Copper Mining Company and International Smelting & Refining Company:

Now therefore it is hereby ordered, adjudged, and decreed that with respect to petitioners Anaconda Copper Mining Company and International Smelting & Refining Company the aforesaid order to cease and desist be, and it hereby is, set aside.

It is hereby further ordered, adjudged, and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the following paragraphs of the aforesaid order to cease and desist be, and they hereby are, set aside:

"It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

* * * * *

3918 "It is further ordered that the respondent, National Lead Company, its officers, agents, representatives and employees do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership, or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments."

It is hereby further ordered, adjudged, and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company and The Eagle-Picher Sales Company, the aforesaid order to cease and desist be, and the same hereby is, modified to read as follows:

Pursuant to Section 5 of the Federal Trade Commission Act:

It is ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of

lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or de-
3919 termined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

Pursuant to Section 2 of the Clayton Act, as amended:

It is further ordered that each of the said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discrim-

3920 inating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments, except dry white lead when not sold as a keg product, at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is hereby further ordered, adjudged, and decreed that as so modified the foregoing portion of said order entered pursuant to Section 5 of the Federal Trade Commission Act be, and the same hereby is, affirmed as to said petitioners, and said petitioners are commanded to obey the same and comply therewith.

It is hereby further ordered, adjudged, and decreed that as so modified the foregoing portion of said order entered pursuant to Section 2 of the Clayton Act, as amended, be, and the same hereby is, affirmed as to said petitioners.

It is further ordered, adjudged, and decreed that petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, and The Eagle-Picher Sales Company shall, within ninety days after service upon them of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have

3921 complied with its said order as herein modified.

Without prejudice to the right of the Federal Trade Commission, the respondent herein, to institute and maintain such proceedings for violation of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

By the Court:

(S) WALTER C. LINDLEY,
(S) H. NATHAN SWAIM,
(S) ELMER J. SCHNACKENBERG,
United States Circuit Judges.

[File endorsement omitted.]

3922 [Clerk's certificate to foregoing transcript omitted in printing.]

3923 Supreme Court of the United States

No. —, October Term, 1955

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY AND ANACONDA COPPER MINING COMPANY

Order extending time to file petition for writ of certiorari to April 19, 1956

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19, 1956.

SHERMAN MINTON,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of March, 1956.

3925 Supreme Court of the United States

No. 858, October Term, 1955

Order allowing certiorari

Filed June 4, 1956

[Title omitted.]

The petitioner herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1956